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October 19, 2016

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BY HAND DELIVERY
Mr. Scott Harris
Clerk of the Supreme Court of the United States
1 First Street, NE
Washington, DC 20543

Re: *Stacey Johnson v. Wendy Kelley*

Dear Mr. Harris:

Please find enclosed an original and 10 copies of a Petition for a Writ of Certiorari and Petitioners' Motion to Proceed In Forma Pauperis, submitted by Petitioners Don Davis, Stacey Johnson, Jack Jones, Ledell Lee, Jason McGehee, Terrick Nooner, Bruce Ward, Marcel Williams, and Kenneth Williams.

Petitioners respectfully request that one copy of the Application be file-stamped and returned to the messenger.

Thank you for your consideration,

Meredith L. Boylan, Esq.

Counsel of Record to Petitioners Don Davis, Stacey Johnson, Jack Jones, Ledell Lee, Jason McGehee, Terrick Nooner, Bruce Ward, Marcel Williams, and Kenneth Williams

TC/447

THIS IS A CAPITAL CASE

No. _____

In the Supreme Court of the United States

STACEY JOHNSON, JASON McGEHEE, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, and LEDELL LEE
Petitioners

v.

WENDY KELLEY, in her official capacity as Director, Arkansas Department of Correction, and ARKANSAS DEPARTMENT OF CORRECTION
Respondents

PETITIONERS' MOTION TO PROCEED IN FORMA PAUPERIS

Petitioners Stacey Johnson, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Marcel Williams, Kenneth Williams, Don Davis, and Ledell Lee ask leave to file the attached petition for writ of certiorari without prepayment of costs and to proceed *in forma pauperis*.

The Circuit Court of Pulaski County, Arkansas, granted Petitioners leave to proceed *in forma pauperis* in the proceedings below. The circuit court's order granting IFP status is attached hereto. Additionally, each Petitioner has previously had counsel appointed for him in habeas corpus proceedings the United States District Court for the Western District of Arkansas (Davis) or the United States District Court for the Eastern District of Arkansas (all other Petitioners).

OCTOBER 19, 2016

Respectfully submitted,

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No. _____

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

STACEY JOHNSON,
JASON MCGEHEE,
BRUCE WARD,
TERRICK NOONER,
JACK JONES,
MARCEL WILLIAMS,
KENNETH WILLIAMS ,
DON DAVIS, &
LEDELL LEE — PLAINTIFFS

v.

WENDY KELLEY, in her official capacity as
Director, Arkansas Department of Correction, and
ARKANSAS DEPARTMENT OF CORRECTION — DEFENDANTS

ORDER GRANTING
PETITION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS*

The plaintiffs in the caption above have all moved to proceed *in forma pauperis* without payment of filing fees. On consideration, the Court hereby orders that the motion to proceed *in forma pauperis* and to proceed without filing fees should be and hereby is GRANTED.

IT IS SO ORDERED

_____
Circuit Judge

6-29-15
Date

THIS IS A CAPITAL CASE

No. _____

In the Supreme Court of the United States

STACEY JOHNSON, JASON McGEHEE, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, and LEDELL LEE

Petitioners

v.

WENDY KELLEY, in her official capacity as Director, Arkansas Department of Correction, and ARKANSAS DEPARTMENT OF CORRECTION

Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Arkansas

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED
CAPITAL CASE

The Eighth Amendment requires a prisoner challenging a method of execution to (1) establish that the method will likely cause extreme pain and (2) "plead and prove a known and available alternative." *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015). Petitioners presented evidence that the current execution method will cause extreme pain. The trial court found this evidence sufficient to require a hearing; the Arkansas Supreme Court did not disturb this conclusion. Petitioners also pled five alternatives—firing squad and four pharmaceutical means—but the Arkansas Supreme Court dismissed Petitioners' complaint because those alternatives are not found in Arkansas statute. The questions presented are:

1. In a means-of-execution suit, are known and available alternatives limited to those already provided in a statute an inmate is challenging?
2. Does an inmate plead a known and available alternative by identifying an execution method—firing squad—that other states have used and that the state has admitted it can carry out?
3. Does an inmate plead a known and available alternative by identifying a lethal-injection drug and identifying vendors who currently sell it?

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Stacey Johnson, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Marcel Williams, Kenneth Williams, Don Davis, and Ledell Lee respectfully petition for a writ of certiorari to review the judgment of the Arkansas Supreme Court.

OPINIONS BELOW

The opinion of the Arkansas Supreme Court (App. 1a–39a) is reported at 2016 Ark. 268. The order of the Arkansas Supreme Court denying rehearing (App. 40a) is unreported. The orders of the Pulaski County Circuit Court denying Respondents' motion to dismiss (App. 41a–59a) and denying Respondents' motion for summary judgment (App. 60a–91a) are also unreported.

JURISDICTION

The Arkansas Supreme Court entered judgment on June 23, 2016. App. 1a. The Arkansas Supreme Court denied a timely petition for rehearing on July 21, 2016. App. 40a. This Petition is filed within ninety days of the Arkansas Supreme Court's denial of rehearing. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. VIII: "Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

Ark. Stat. Ann. § 5-4-617(c): "The department shall select one (1) of the following options for a lethal-injection protocol, depending on the availability of the drugs: (1)

A barbiturate; or (2) Midazolam, followed by vecuronium bromide, followed by potassium chloride."

STATEMENT OF THE CASE

This case involves a challenge to the current method of execution in Arkansas: lethal injection using 500 mg midazolam (a sedative), followed by 100 mg vecuronium bromide (a paralytic), followed by 240 mEq potassium chloride (a heart-stopping agent) (hereinafter "Midazolam Protocol"). Petitioners filed a complaint and affidavits showing that the Midazolam Protocol is likely to cause extreme pain, that four safer pharmaceutical means of execution are available on the market, and that the State has the means to use a firing squad. Months after Petitioners commenced this litigation, the Governor of Arkansas ordered the execution of eight of the nine Petitioners. Executions were to commence six weeks after the order and were to occur twice a night over a span of less than three months. Amidst these warrants, the trial court found evidence that the Midazolam Protocol would cause a constitutionally unacceptable level of pain and determined a hearing was required. Respondents appealed.

Without mentioning the trial court's finding regarding pain, and relying entirely on this Court's jurisprudence, the Arkansas Supreme Court found Petitioners' submissions inadequate to plead an alternative execution method under the governing standard: "[T]he Eighth Amendment requires a prisoner to plead and prove a known and available alternative." *Glossip v. Gross*, 135 S. Ct. 2726, 2739 (2015). Specifically, the Arkansas Supreme Court held that an alternative is

available for Eighth Amendment purposes only if it is already written into state statute.

This decision is in direct conflict with this Court's precedents. As the Court held in *Baze v. Rees*, 553 U.S. 35, 52 (2008), and as *Glossip* affirmed, the Eighth Amendment *requires* a state to adopt a feasible, available, and substantially safer alternative execution method (even if the state must legislate to do so). The Arkansas Supreme Court's decision perverts that rule. It allows a state to restrict available alternatives—and thus to block method-of-execution challenges—by refusing to legislate (or by legislating patently worse methods, such as Arkansas has by making electrocution a backup). Not only that, it envisions a kaleidoscopic Eighth Amendment—one whose interpretation is guided not by this Court's uniform standard but by thirty-one state statutes establishing various execution methods.

More specifically to this case and to these Petitioners, no court has rejected Petitioners' substantial evidence that the Midazolam Protocol will cause intolerable pain. If the Court does not act on this Petition, Petitioners could be executed with the Midazolam Protocol despite having done everything *Glossip* requires of them.

Because the Arkansas Supreme Court decided an important federal question in a way that conflicts with this Court's precedents, the Court should grant the Petition.

A. The Arkansas proceedings.

In April 2015, Petitioners commenced this litigation in Pulaski County Circuit Court challenging their execution by the Midazolam Protocol on state and federal

constitutional grounds. On September 9, 2015, while the litigation was pending in the circuit court, the State scheduled executions for eight of the nine Petitioners. It set four dates—two executions per night—over a nearly three-month period. *See Arkansas Governor Sets Execution Dates after 10-Year Gap*, CHI. TRIBUNE, Sept. 9, 2015, *available at* http://trib.in/2dTgMSD. The Arkansas Supreme Court stayed the executions. *See Kelley v. Griffen*, 472 S.W.3d 135 (Ark. 2015). It also stayed its mandate pending disposition of proceedings in this Court. App. 40a. Though no executions are currently scheduled, the State has signaled its intention to proceed with executions as soon as possible. *See* Jacob Kauffman, *Arkansas Governor Hopes to Start Executions by January*, KUAR, July 13, 2016, *available at* http://bit.ly/2eg3tqN. The State recently reiterated this intention in its opposition to Petitioners' request for a thirty-day extension to file this Petition. No. 16A336, Opp. to App. for Extension of Time at 5 (Oct. 6, 2016).[1]

On September 28, 2015, Petitioners filed an amended complaint alleging that the Midazolam Protocol is cruel or unusual punishment under Article 2, Section 9 of the Arkansas Constitution. Petitioners pled that the Midazolam Protocol exposes them to an objectively intolerable risk of serious harm and pled alternative available execution methods. Am. Compl. at 29–44, 52–54 (Sept. 28, 2015). Respondents moved to dismiss and for summary judgment. The circuit court denied these motions. App. 41a–91a. Respondents appealed to the Arkansas Supreme

[1] Petitioners applied for the thirty-day extension on October 5, 2016, to give new Supreme Court counsel additional time to prepare. The Circuit Justice rejected Petitioners' application on October 7, 2016.

Court, which, by a 4-3 vote, dismissed the amended complaint on the express basis of *Baze* and *Glossip*. App. 1a–39a. The lower-court proceedings addressed the following relevant issues:

(i) Substantial risk of intolerable pain. In support of their obligation to plead a substantial risk of intolerable pain, Petitioners attached an affidavit from Craig Stevens, doctor of pharmacology at Oklahoma State University. Am. Compl. Exh. 5. Unlike the plaintiffs' experts in *Glossip*—who "had not actually done the relevant calculations," *Glossip*, 135 S. Ct. at 2743—Dr. Stevens calculated a "ceiling effect" for midazolam that occurs below the 500 mg dose with which Respondents intend to inject Petitioners. Am. Compl. Exh. 5 at 18–27. This calculation offered additional proof that, as Dr. Stevens ultimately concluded in his thirty-six-page affidavit, midazolam will not prevent Petitioners from feeling the torturous pain that (as no one disputes) the other drugs in the Protocol cause.[2] In response, Respondents relied primarily on the affidavit of Daniel Buffington, a pharmacist, who opined that a 500 mg dose of midazolam will render Petitioners insensate to pain and criticized Dr. Stevens' methodology in calculating the ceiling effect. Mot. Summ. J.

[2] Arkansas is one of eight states with statutes or regulations allowing midazolam to be used in executions. The others are Alabama, Appellees' Br. at 6, *Arthur v. Dunn*, No. 16-15549, (11th Cir. Oct. 11, 2016); Arizona, Ariz. Dep't Corr. Order 710, Attachment D at 3 (Oct. 23, 2015); Florida, Fla. Execution by Lethal Injection Procedures 9(f) (Jan. 9, 2015); Louisiana, La. Dep't Pub. Safety & Corr. Reg. C-03-011, Attachment E at 5 (Mar. 12, 2014); Mississippi, *Jordan v. Fisher*, 823 F.3d 805, 808 (5th Cir. 2016); Ohio, Ohio Dep't Rehab. & Corr. Reg. 01-COM-11 at 8–9 (Oct. 7, 2016); and Oklahoma, Okla. Dep't Corr. OP-040301, Attachment D at 3 (June 30, 2015). Additionally, Nevada has announced its intention to use midazolam. *See* Sandra Chereb, *Nevada Pursues Death Chamber, Controversial Drug*, LAS VEGAS REVIEW-JOURNAL, July 13, 2015, *available at* http://bit.ly/1UY790g.

Exh. 4 (Oct. 16, 2015). Dr. Stevens submitted a rebuttal report further supporting his conclusions. Summ. J. Resp. Exh. 21 (Nov. 9, 2015).

The circuit court concluded Petitioners' amended complaint sufficiently alleged that midazolam would not render them insensate to the undisputed pain caused by the other drugs. App. 57a–58a. The circuit court also denied Respondents' motion for summary judgment in light of the parties' "conflicting affidavits concerning the efficacy of midazolam and whether the three-drug protocol . . . poses a substantial risk that [Petitioners] will experience cruel or unusual punishment." App. 75a.

Respondents asked the Arkansas Supreme Court to reverse these portions of the circuit court's rulings. Ark. S. Ct. Br. at 8–14 (Feb. 4, 2016). The court did not do so. Instead, it remained silent. Thus, the only Court to have ruled upon Petitioners' evidence of severe pain concluded that this evidence is substantial, credible, and sufficient to require a trial on the merits.

(ii) Alternative execution methods. Petitioners also pled five alternative execution methods: (a) firing squad and (b) four pharmaceutical means (anesthetic inhalant, injection of an FDA-approved barbiturate, injection of an opioid, and administration of an opioid via transdermal patch). Am. Compl. at 54. The Arkansas Supreme Court reversed on the sole ground that Petitioners failed to satisfy their Eighth Amendment burden to plead alternatives. App. 15a–20a.

a. Firing squad. Petitioners pled that "the State of Arkansas has access to guns and ammunition" and "could find personnel with the skill to competently perform an execution by firing squad." Am. Compl. at 40. Petitioners relied on a

declaration from Dr. Jonathan Groner, a surgeon, who opined that execution by firing squad results in a quick death with little or no pain. Am. Compl. Exh. 6.

Respondents offered no evidence to rebut the feasibility and availability of a firing squad. In their answer to the amended complaint, they expressly admitted that "the State of Arkansas has guns, ammunition, and access to personnel skilled in the use of firearms." Answer at 18 (Oct. 23, 2015).

In dismissing the amended complaint, the Arkansas Supreme Court's majority opinion explained that a firing squad is not available because "this proposal does not comply with the current statutory scheme." App. 20a. The court held that, because Arkansas statute does not provide for execution by firing squad, it is inadequate to plead that a firing squad would result in instant death and that the State has equipment and personnel needed for a firing squad. App. 19a–20a.

b. Drugs. In his affidavit attached to the amended complaint, Dr. Stevens swore that Petitioners' pharmaceutical alternatives would reduce the risk of pain inherent in the Midazolam Protocol and identified several vendors from which these alternatives are available. Am. Compl. Exh. 5 at 31–35. Respondents offered an affidavit from an Arkansas corrections official. Mot. Summ. J. Exh. 3 (Oct. 16, 2016). According to the affidavit, the official could not obtain a commitment to sell Petitioners' proposed alternatives after a day's effort. *Id.* The Arkansas Supreme Court determined that the amended complaint was insufficient under *Glossip* because it pled only that the pharmaceutical

alternatives are "commercially available"—not that they are available to a state for use in executions. App. 19a. The court did not indicate what a prisoner would need to show in order to establish availability to the State.

B. This Court's jurisdiction.

Petitioners' amended complaint alleges claims under the Arkansas Constitution's cruel-or-unusual-punishment provision. Petitioners argued in the courts below that the *Glossip* standard is not controlling in a method-of-execution challenge under the Arkansas Constitution.[3] The State argued, repeatedly and consistently, that the Arkansas Constitution must be interpreted identically with the Eighth Amendment standards articulated in *Baze* and *Glossip*.[4] The Arkansas Supreme Court agreed with Respondents, explaining that it interprets the state constitutional provision and the Eighth Amendment in lockstep absent "legal authority or persuasive argument to change [its] legal course." App. 15a. Finding none, the court held that *Glossip* and *Baze* control: "[W]e decline [Petitioners'] invitation to depart from our practice of interpreting our constitutional provision

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[3] Br. Supp. Emergency Mot. Partial Summ. J. at 52 n.6 (Sept. 30, 2015); Ark. S. Ct. Resp. Br. at 6–9 (Apr. 4, 2016).

[4] Br. Supp. Mot. Dismiss at 46 (Oct. 5, 2015) (arguing that the complaint "fails to State a claim under *Glossip*"); Br. Supp. Cross-mot. Summ. J. at 45 (Oct. 16, 2015) (arguing that Petitioners "failed to meet their burden of proving that alternative methods of execution are 'feasible,' 'readily implemented' by [Respondents], and that they would 'significantly' reduce a substantial risk of severe pain as required under *Glossip* and *Baze*"); Ark. S. Ct. Br. at 4 (Feb. 4, 2016) ("[T]his Court follows federal precedents construing the Eighth Amendment in evaluating claims under Article 2, § 9."); Reply Br. at 5 (Apr. 15, 2016) ("[F]or more than 40 years, this Court has held that U.S. Supreme Court decisions construing the Eighth Amendment, both generally and specifically with regard to the death penalty, are dispositive of cruelty claims arising under Art. 2, § 9 of the Arkansas Constitution.").

along the same lines as federal precedent, and we hereby adopt the standards enunciated in both *Baze* and *Glossip*." App. 15a.

In these circumstances—where the state court's decision is "interwoven with the federal law"—it is well established that there is no independent state ground for decision and that this Court has jurisdiction to consider the case. *Michigan v. Long*, 463 U.S. 1032, 1040 (1983). Because the Arkansas Supreme Court "adopt[ed] the standards enunciated in both *Baze* and *Glossip*," App. 15a–20a, and because it purported to apply only those standards to justify dismissal of Petitioners' amended complaint, the opinion below presents a federal question that this Court has authority to decide. *Cf. Ohio v. Robinette*, 519 U.S. 33, 37 (1996) (finding jurisdiction where "the opinion clearly relies on federal law" and where "the only cases it discusses or even cites are federal cases, except for one state case which itself applies the Federal Constitution"); *Pennsylvania v. Muniz*, 496 U.S. 582, 588 n.4 (1990) (jurisdiction exists where a state court says the state and federal constitutional provisions are "identical").

REASONS FOR GRANTING THE PETITION

The Arkansas Supreme Court's opinion requires a trial court to dismiss a means-of-execution lawsuit—even one in which there is evidence of extreme pain—if the complaint does not propose an alternative execution method that is already written into statute. Such a rule depends on the tenuous rationale that a prisoner must rely on the very statute under attack to bring a successful challenge. And the rule is practically as well as logically implausible. If left to stand, it would severely

restrict (if not eliminate altogether) a prisoner's ability to satisfy the *Glossip* standard. Failure to present a statutorily available method ends the case even if there is evidence—as there was here—that the alternative is available as a matter of fact and the current execution method will cause extreme pain.

Whether the State may inflict such pain without considering a superior, factually available alternative would be an important question in itself. But this question gains additional importance for two reasons: the Arkansas Supreme Court's decision conflicts with the precedents of this Court it purports to apply, and the Arkansas Supreme Court's rule portends a fracturing of Eighth Amendment law around the nation. As exemplified by the opinion below, the *Glossip* rule is sufficiently problematic that the Court should take this opportunity to clarify it.

A. The Arkansas Supreme Court's decision conflicts with *Baze* and *Glossip*.

This Court first considered a substantive Eighth Amendment challenge to a lethal-injection protocol in *Baze*. There, the Court explained that "a condemned prisoner cannot successfully challenge a State's method of execution merely by showing a slightly or marginally safer alternative." *Baze*, 553 U.S. at 51. However, if the current execution method entails a "substantial risk of serious harm," and if the condemned offers an alternative that is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain," then "a State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Id.* at 52. *Glossip* did not alter this standard; rather, it held that the plaintiff's obligation to "plead and prove" an adequate alternative is a substantive

Eighth Amendment requirement. *Glossip*, 135 S. Ct. at 2739. Neither *Baze* nor *Glossip* employed the circular logic the Arkansas Supreme Court used here: that a plaintiff must state an alternative execution method to challenge a state's execution statute but may only plead a method already listed in that statute.

Whether an alternative method of execution has been codified does not determine whether it is "feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain." To be sure, if a state does not already authorize the prisoner's alternative, the state's legislature may ultimately decide to amend the law. But this Court has not held that a need for legislation renders an alternative execution method unfeasible. Quite the contrary—the logic of *Baze* is that the legislature (*i.e.*, the State) is constitutionally *required* to adopt a safer alternative if such an alternative is manageable. "[A] State's refusal to change its method can be viewed as 'cruel and unusual' under the Eighth Amendment." *Baze*, 553 U.S. at 52.

Requiring a method of execution to be codified before it can effectively be pled as an alternative would empower state legislatures to foreclose all method-of-execution challenges. After the Arkansas Supreme Court's decision, the Arkansas General Assembly could amend the statute to eliminate any reference to execution methods other than the Midazolam Protocol. Though a condemned inmate may be able to show the Midazolam Protocol will lead to extreme suffering—and the circuit court credited Petitioners' evidence of such suffering here—under the Arkansas Supreme Court's interpretation of the Eighth Amendment, the method would nonetheless be

constitutional because there would be no *statutory* alternative. This Court has been clear that it does not intend to immunize states from Eighth Amendment litigation in this fashion. *See id.* at 52 n.3 (rejecting the argument that courts should not consider means-of-execution litigation and explaining that suits will be limited by the "substantive requirements in the articulated standard"). Indeed, the Arkansas Supreme Court's decision is so far divorced from this Court's precedents that summary reversal would be warranted.

B. The Arkansas approach portends a nationwide fracturing of Eighth Amendment law.

Were the Arkansas approach correct, application of the Eighth Amendment in method-of-execution challenges would depend upon the statutory scheme of the state in which the suit is brought. Thirty-one states have a method-of-execution statute on the books;[5] all of them permit lethal injection. In fifteen states, lethal injection is the sole statutory method.[6] Sixteen states specify at least one additional method, whether as a backup to lethal injection or as an option for the condemned.[7]

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[5] This number accounts for the thirty states that currently have the death penalty and Delaware. The Delaware Supreme Court has struck down the state's capital-punishment statute, *see Rauf v. Delaware*, No. 39, 2016 Del. LEXIS 419 (Del. Aug. 2, 2016), but Delaware still prescribes a method of execution for those already on death row.

[6] *See* Colo. Rev. Stat. § 18-1.3-1202; Ga. Code Ann. § 17-10-38(a); Idaho Code § 19-2716; Ind. Code § 35-38-6-1(a); Kan. Stat. Ann. § 22-4001(a); La. Stat. Ann. § 15:569(B); Miss. Code Ann. § 99-19-51(1); Mont. Code Ann. § 46-19-103(3); Nev. Rev. Stat. § 176.355(1); N.C. Gen. Stat. § 15-187; Ohio Rev. Code Ann. § 2949.22; Or. Rev. Stat. § 137.473(1); 61 Pa. Cons. Stat. § 4304(a); S.D. Codified Laws § 23A-27A-32; Tex. Code Crim. Proc. art. 43.14(a).

[7] *See* Ala. Code § 15-18-82.1(a) (electrocution); Ark. Code Ann. § 5-4-617(k) (electrocution); Ariz. Rev. Stat. § 13-757(B) (gas); Cal. Penal Code § 3604(a) (gas); Del. Code Ann. tit. 11, § 4209(f) (hanging); Fla. Stat. § 922.105(1) (electrocution); Ky. Rev. Stat. Ann. § 431.220(1) (electrocution); Mo. Rev. Stat. § 546.720(1) (gas); N.H. Rev. Stat. Ann. § 630:5(XIV) (hanging); Okla. Stat. tit. 22, § 1014 (nitrogen hypoxia, electrocution, or firing squad); S.C.

The differences do not stop there. Eight lethal-injection statutes specify the substance to be injected;[8] the remaining twenty-three more generally permit injection of any substance that will cause death.[9]

Under the Arkansas Supreme Court's rule, the variety of state execution statutes would produce an equal variety of Eighth Amendment outcomes, thereby destroying the uniformity of federal constitutional protection. Plaintiffs in the fifteen states that make lethal injection the sole execution method could propose no alternative to lethal injection. Alternatives would be further restricted in states that prescribe specific substances that must be injected. Thus, in five states—Colorado, Mississippi, Montana, Oregon, and Pennsylvania—inmates would have

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Code Ann. § 24-3-530(A) (electrocution); Tenn. Code Ann. § 40-23-114(b), (e) (electrocution); Utah Code Ann. § 77-18-5.5 (firing squad); Va. Code Ann. § 53.1-234 (electrocution); Wash. Rev. Code § 10.95.180(1) (hanging); Wyo. Stat. Ann. § 7-13-904(b) (gas).

[8] *See* Ark. Code Ann. § 5-4-617(c) (barbiturate or midazolam followed by vecuronium bromide followed by potassium chloride); Colo. Rev. Stat. § 18-1.3-1202 (sodium thiopental or "equally or more effective substance"); Miss. Code Ann. § 99-19-51(1) ("ultra short-acting barbiturate or other similar drug in combination with a chemical paralytic agent"); Mont. Code Ann. § 46-19-103(3) ("ultra-fast-acting barbiturate in combination with a chemical paralytic agent"); N.H. Rev. Stat. Ann. § 630:5(XIII) ("ultrashort-acting barbiturate in combination with a chemical paralytic agent"); Or. Rev. Stat. § 137.473(1) ("ultrashort-acting barbiturate in combination with a chemical paralytic agent and potassium chloride or other equally effective substances to cause death"); 61 Pa. Cons. Stat. § 4304(a) ("ultrashort-acting barbiturate in combination with chemical paralytic agents approved by the department"); Wyo. Stat. Ann. § 7-13-904(a) ("ultra-short-acting barbiturate, alone or in combination with a chemical paralytic agent and potassium chloride, or other equally effective substance or substances sufficient to cause death").

[9] *See* Ala. Code § 15-18-82.1(a); Ariz. Rev. Stat. § 13-757(A); Cal. Penal Code § 3604(a); Del. Code Ann. tit. 11, § 4209(f); Fla. Stat. § 922.105(1); Ga. Code Ann. § 17-10-38(a); Idaho Code § 19-2716; Ind. Code § 35-38-6-1(a); Kan. Stat. Ann. § 22-4001(a); Ky. Rev. Stat. Ann. § 431.220(1); La. Stat. Ann. § 15:569(B); Mo. Rev. Stat. § 546.720(1); Nev. Rev. Stat. § 176.355(1); N.C. Gen. Stat. § 15-188; Ohio Rev. Code Ann. § 2949.22; Okla. Stat. tit. 22, § 1014(A); S.C. Code Ann. § 24-3-530(A); S.D. Codified Laws § 23A-27A-32; Tenn. Code Ann. § 40-23-114(a); Tex. Code Crim. Proc. art. 43.14(a); Utah Code Ann. § 77-18-5.5(1); Va. Code Ann. § 53.1-234; Wash. Rev. Code § 10.95.180(1).

no route to challenge the method of their execution, for those states prescribe specific substances to be injected and offer no additional alternative. Inmates in other jurisdictions would be severely limited in their ability to bring a claim. While plaintiffs in Oklahoma and Utah, for example, could claim that the firing squad is an available alternative, other plaintiffs could not because their states' statutes do not permit the firing squad. In New Hampshire, the only "available" alternative to the given method—an "ultrashort-acting barbiturate in combination with a chemical paralytic agent"—would be hanging, which statute permits if the injection is not possible. In short, the available alternatives under the Eighth Amendment would be wholly a function of the relevant jurisdiction's statutes.

The threat of this outcome is neither hypothetical nor limited to Arkansas. An Alabama district court has also held that, under *Glossip*, an alternative execution method is feasible only if a state statute explicitly permits it. *Arthur v. Myers*, No. 11-438, 2015 U.S. Dist. LEXIS 135315, at *3 (M.D. Ala. Oct. 5, 2015). This ruling is currently on appeal in advance of the plaintiff's November 3, 2016, execution date. *See Arthur v. Dunn*, No. 16-15549 (11th Cir. filed Aug. 18, 2016). The Arkansas Supreme Court's misinterpretation forebodes ill effects, both for Petitioners, whose execution dates would immediately follow denial of review, and for the uniform administration of federal constitutional law.[10]

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[10] The Arkansas Supreme Court's decision is also in tension with the law of the United States Court of Appeals for the Fifth Circuit. In *Jordan v. Fisher*, 823 F.3d 805, 811–12 (5th Cir. 2016), that Court held that a state does not violate due process if it chooses an execution method that is not statutorily approved. Thus, in the Fifth Circuit, the state may choose an alternative that statute does not sanction; in Alabama and Arkansas, a prisoner may not choose an alternative that statute does not sanction.

The "'fundamental principle' of our Constitution, as Justice O'Connor once put it, is 'that a single sovereign's laws should be applied equally to all.'" *Danforth v. Minnesota*, 552 U.S. 264, 301–02 (2008) (Roberts, C.J., dissenting) (quoting Justice Sandra Day O'Connor, *Our Judicial Federalism*, 35 CASE W. RES. L. REV. 1, 4 (1985)). "It cannot be doubted that there is an important need for uniformity in federal law." *Long*, 463 U.S. at 1040. That need would be ill-served by the balkanized Eighth Amendment jurisprudence the Arkansas Supreme Court's decision promises. The Court should step in to preserve uniformity now.

C. Petitioners' evidence of severe pain imbues this case with additional importance.

In the circuit court, Petitioners presented substantial credible evidence that the Midazolam Protocol will cause them excruciating pain. The circuit court concluded this evidence was sufficient to create a question of material fact on *Glossip*'s first prong. And the Arkansas Supreme Court neither evaluated Petitioners' evidence nor reversed the circuit court's determination that there was an issue of fact to be tried on the first prong. Instead, it held that the amended complaint must be dismissed for failure to adequately state an alternative execution method.

Resolution of the questions presented is especially important in light of this record. Without correction of the Arkansas Supreme Court's manifest misinterpretation of *Baze* and *Glossip*, Petitioners could be executed without any hearing on their evidence of substantial harm. Indeed, they could be executed even though the only court to have considered this evidence—the circuit court—determined it was sufficient to require a trial on the merits. The Eighth

Amendment prevents the State from inflicting punishment that it knows is likely to cause extreme pain. *See Baze*, 553 U.S. at 50 (explaining that the Eighth Amendment prohibits an "objectively intolerable risk of harm that prevents . . . officials from pleading that they were subjectively blameless" (internal quotation marks omitted)). Yet the Arkansas Supreme Court overlooked substantial evidence of extreme suffering. To ignore this evidence, and to then dismiss a case on flimsy alternative-method grounds, sanctions the very evil the Eighth Amendment is meant to stop.[11]

D. The Court should clarify the requirement to plead an alternative method.

Besides limiting Petitioners' possible alternatives to those already in the Arkansas statute—*i.e.*, barbiturate drugs and the electric chair—the Arkansas Supreme Court misapplied this Court's precedents in another respect. Namely, it held that the following, in combination, does not satisfy a plaintiff's Eighth Amendment burden to plead an alternative execution method: (1) an expert affidavit outlining four substantially less painful drug alternatives and identifying sellers of those alternatives; (2) an expert affidavit attesting that the firing squad is a relatively quick and painless means of death; and (3) a pleading, confirmed by Respondents' answer, that alleges equipment and personnel needed to carry out an

[11] Notably, this Court has declined to rely solely on the alternative-method prong where there was evidence that an execution method would cause a plaintiff substantial pain. *Compare Johnson v. Lombardi*, 809 F.3d 388, 391 (8th Cir. 2015) (denying stay in part because petitioner was unlikely to show proposed alternative feasible), *with Johnson v. Lombardi*, 136 S. Ct. 443 (2015) (granting stay to same petitioner without mentioning alternative-method prong).

execution by firing squad are available to the State.[12] Regardless of whether Petitioners ultimately can prove their case, this is exactly the sort of pleading the Eighth Amendment requires. *Cf. First Amendment Coal. of Ariz. v. Ryan*, No. 14-1447, 2016 U.S. Dist. LEXIS 66113, at *20 (D. Ariz. May 18, 2016) (finding claim adequately pled where plaintiffs "allege that alternatives to midazolam, such as pentobarbital, are readily available"); *Price v. Dunn*, No. 14-472, 2015 U.S. Dist. LEXIS 152656, at *27–30 (S.D. Ala. Oct. 20, 2015) (explaining that *Glossip* applied a clear-error standard after fact-finding and concluding pleading of alternatives was adequate where plaintiff "identified in his amended complaint known and available alternative drugs to midazolam, namely, compounded barbiturates").

The Arkansas Supreme Court's stingy view of the Eighth Amendment pleading requirement is yet another example of how its opinion misconstrues *Glossip*. In

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[12] It is possible that the Arkansas Supreme Court's reasoning in this case resulted from squeamishness about a firing squad. That concern should not distort interpretation of the law or distract from what is at stake: infliction of needless suffering during an execution. The record before the Arkansas Supreme Court established the firing squad's availability and the lower risk of unnecessary suffering it entails. States have used firing squads as recently as 2010, when Utah executed Ronnie Lee Gardner. Jurists, scholars, and other commentators have noted that the firing squad is a more honest execution method than lethal injection. *See Wood v. Ryan*, 759 F.3d 1076, 1102–03 (9th Cir. 2014) (Kozinski, J., dissenting from denial of rehearing en banc); Alexander Vey, Note, *No Clean Hands in a Dirty Business: Firing Squads and the Euphemism of "Evolving Standards of Decency"*, 69 VAND. L. REV. 545 (2016). There is growing recognition that the firing squad is safer and more reliable than lethal injection (whatever the drug to be injected). *See, e.g.*, *Glossip*, 135 S. Ct. at 2796 (Sotomayor, J., dissenting) ("[T]here is evidence to suggest that the firing squad is significantly more reliable than other methods, including lethal injection using the various combination of drugs thus far developed."); Deborah W. Denno, *The Firing Squad as a "Known and Available Alternative Method of Execution" Post-*Glossip, 49 U. MICH. J. L. REF. 749 (2016). And this Court has sanctioned firing squads—a ruling the Court has neither revisited not overturned. *See Wilkerson v. Utah*, 99 U.S. 130 (1879). The firing squad's appearance of brutality has no bearing on the relevant legal question: whether it is available to the State and will reduce the suffering of the condemned.

Glossip, the Court concluded, after an evidentiary hearing, that the plaintiffs were not entitled to a preliminary injunction because (in part) they had failed to show viable alternatives. The district court had specifically found that Oklahoma could not obtain the plaintiffs' two proposed alternatives "despite a good-faith effort to do so." *Glossip*, 135 S. Ct. at 2738. The Court did not address what it means to plead an alternative execution method. The Arkansas Supreme Court was wrong to read *Glossip* to foreclose Petitioners' amended complaint, particularly give the ready—and admitted—availability of an alternative proposed below.

The dissenting justices in *Glossip* noted that the Court's Eighth Amendment standard might permit an inmate's suffering for want of an alternative execution method. *See id.* at 2795 (Sotomayor, J., dissenting). The opinion below exhibits a more pernicious problem: even where a prisoner has proposed an alternative method in a pleading or offered evidence that an alternative is factually available, courts are using the alternative-method prong to block legitimate development of evidence of suffering. *See, e.g.*, *Whitaker v. Livingston*, No. 13-2901, 2016 U.S. Dist. LEXIS 73101, at *12–13 (S.D. Tex. June 6, 2016) (dismissing complaint after concluding, in part, that it is inadequate to plead "a single dose of an FDA approved barbiturate" as an alternative), *appeal pending*, No. 16-20364 (5th Cir. filed June 13, 2016); *Boyd v. Myers*, No. 14-1017, 2015 U.S. Dist. LEXIS 136748, at *11–14 (M.D. Ala. Oct. 7, 2015) (refusing to allow amended complaint because plaintiffs' alternatives "are not permitted by statute in Alabama"). In light of this problem, the

Court should clarify the showing necessary to plead and prove an alternative execution method.[13]

The opinion below ignores substantial evidence of pain despite a complaint that lays out available alternatives in detail. The Court should brook neither this extreme departure from its precedents nor the intolerable pain the underlying record shows the Midazolam Protocol will cause. The Court should clarify that pleadings such as Petitioners' satisfy the Eighth Amendment's requirements.

CONCLUSION

Not only did the Arkansas Supreme Court misinterpret this Court's Eighth Amendment precedents, but it did so in a way that promises to distort Eighth

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[13] *Glossip*'s aftermath further exhibits the need for additional guidance. *Glossip* has not had the effect of allowing Oklahoma to carry out executions. Rather, the lethal-injection regime in Oklahoma has proven even more dysfunctional after the State's victory in this Court.

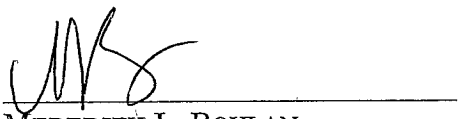
After the Court's decision in *Glossip*, Oklahoma set an execution date for Richard Glossip, the named petitioner in the case. That execution did not come to pass. Hours before Glossip was to be executed, the State granted a reprieve after a member of the execution team discovered that the Oklahoma Department of Corrections possessed—and intended to use—potassium acetate as the heart-stopping agent. Oklahoma's execution protocol called for execution by a different drug—potassium chloride. Shortly thereafter, it emerged that, despite the protocol's potassium-chloride requirement, Oklahoma had nevertheless used potassium acetate in the execution of Charles Warner. Warner was the original named plaintiff in what became the *Glossip* case; Oklahoma executed him after this Court denied a stay. *See Warner v. Gross*, 135 S. Ct. 824 (2015).

The circumstances surrounding Warner's execution and Glossip's near-execution are the subject of an extensive report by an Oklahoma grand jury. *See In re Multicounty Grand Jury, State of Oklahoma*, No. GJ-2014-1 (D. Ct. Okla. Cnty. May 19, 2016) (Interim Report No. 14), *available at* http://bit.ly/2aaXm4n. Among other problems discussed in the report, the State's pharmacist ordered the wrong drug, *id.* at 25; the prison warden failed to confirm that the correct drugs were procured, *id.* at 33–34; and the governor's counsel recommended that Glossip's injection continue, despite knowing that the State would be substituting the incorrect drug, *id.* at 66–67. Executions in Oklahoma remain on hold indefinitely as the State continues to evaluate its protocol in the wake of these post-*Glossip* discoveries.

Amendment law nationwide. Failure to hear Petitioners' case will likely precipitate a wave of executions that—as the record here shows, and as no court has found otherwise—will be intolerably painful. The Court should grant this Petition.

OCTOBER 19, 2016

Respectfully submitted,



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APPENDIX

Appendix A

SUPREME COURT OF ARKANSAS

No. CV-15-992

WENDY KELLEY, IN HER OFFICIAL CAPACITY AS DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION; AND ARKANSAS DEPARTMENT OF CORRECTION APPELLANTS V. STACEY JOHNSON, JASON MCGEHEE, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, AND LEDELL LEE APPELLEES	**Opinion Delivered:** June 23, 2016 APPEAL FROM THE PULASKI COUNTY CIRCUIT COURT [60CV-15-2921] HONORABLE WENDELL GRIFFEN, JUDGE REVERSED AND DISMISSED; MOTION TO STRIKE MOOT.

COURTNEY HUDSON GOODSON, Associate Justice

Appellants Wendy Kelley, in her official capacity as Director of the Arkansas Department of Correction, and the Arkansas Department of Correction (collectively "ADC") appeal the orders entered by the Pulaski County Circuit Court denying their motions to dismiss and for summary judgment against multiple claims challenging the constitutionality of Act 1096 of 2015 brought by appellees Stacey Johnson, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Marcel Williams, Don Davis, and Ledell Lee (collectively "Prisoners"). For reversal, ADC contends that the Prisoners failed to sufficiently plead and prove their asserted constitutional violations in order to overcome the defense of sovereign immunity. We reverse the circuit court's decision in toto and dismiss the Prisoners' amended complaint.

I. *Factual Background*

This litigation was initiated by the Prisoners who are under sentences of death for capital murder, and the issues are centered on Act 1096 of 2015 (the "Act"), which is codified at Arkansas Code Annotated section 5-4-617 (Supp. 2015). The Act establishes the current method by which executions are to be conducted in Arkansas.

The Act amends the previous method-of-execution statute, formerly found at Arkansas Code Annotated section 5-4-617 (Repl. 2013), that was passed into law by Act 139 of 2013. Under Act 139, the protocol entailed the intravenous administration of a benzodiazepine to be followed by a "lethal injection of a barbiturate in an amount sufficient to cause death." Ark. Code Ann. § 5-4-617(a) & (b) (Repl. 2013). It also exempted information about execution procedures and their implementation from the Arkansas Freedom of Information Act (FOIA). Ark. Code Ann. § 5-4-617(g) (Repl. 2013). The Prisoners, with the exception of Ledell Lee, previously brought a declaratory-judgment action against ADC in regard to Act 139. In that complaint, the Prisoners asserted, among other things, that Act 139 violated the separation-of-powers doctrine under the Arkansas Constitution because the statute delegated unbridled discretion to ADC in determining which drug was to be used for lethal injection. In connection with that lawsuit, the parties entered into a settlement agreement on June 14, 2013. Because ADC had decided not to employ the then existing lethal-injection protocol, the Prisoners agreed to forgo their as-applied claims contesting the constitutionality of the protocol in exchange for ADC's agreement to not raise the defense of res judicata should the Prisoners reassert an as-applied claim. Also as part of the settlement, ADC agreed to provide a copy of the new protocol,

and once the selected drugs were obtained, to "disclose the packaging slips, package inserts, and box labels received from the supplier." Ultimately, the Prisoners prevailed in the circuit court on their facial challenge to Act 139. However, this court reversed, holding that Act 139 did not violate separation of powers because the statute provided reasonable guidelines to ADC in determining the method to use in carrying out the death penalty. *Hobbs v. McGehee*, 2015 Ark. 116, 458 S.W.3d 707.[1]

Act 1096 became effective on April 6, 2015, soon after our decision in *McGehee*. The salient features of the present Act are two-fold. First, it modifies the permissible means of execution by lethal injection:

> (c) The department shall select one (1) of the following options for a lethal-injection protocol, depending on the availability of the drugs:
>
> (1) A barbiturate; or
>
> (2) Midazolam, followed by vecuronium bromide, followed by potassium chloride.

Ark. Code Ann. § 5-4-617(c) (Supp. 2015). Further, the Act provides that the drugs used to carry out the lethal injection shall be (1) approved by the United States Food and Drug Administration (FDA) and made by a manufacturer approved by the FDA; (2) obtained by a facility registered with the FDA; or (3) obtained from a compounding pharmacy that has been accredited by a national organization that accredits compounding pharmacies. Ark.

[1] Prior to the decision in *McGehee*, *supra*, this court struck down the 2009 Methods of Execution Act on a separation-of-powers claim because the legislation granted ADC the unfettered discretion to determine all protocols and procedures for implementing executions, including the chemicals to be used. *Hobbs v. Jones*, 2012 Ark. 293, 412 S.W.3d 844.

Code Ann. § 5-4-617(d) (Supp. 2015). Like Act 139 of 2013, the Act also provides that the ADC shall carry out the sentence of death by electrocution if execution by lethal injection is invalidated by a final and unappealable court order. Ark. Code Ann. § 5-4-617(k) (Supp. 2015).

The second departure from the former law lies in the Act's nondisclosure provisions. While the Act maintains the previous FOIA exemption, it also contains the following confidentiality requirements:

> (2) The department shall keep confidential all information that may identify or lead to the identification of:
>
> > (A) The entities and persons who participate in the execution process or administer the lethal injection; and
> >
> > (B) The entities and persons who compound, test, sell, or supply the drug or drugs described in subsection (c) of this section, medical supplies, or medical equipment for the execution process.
>
> (3) The department shall not disclose the information covered under this subsection in litigation without first applying to the court for a protective order regarding the information under this subsection.

Ark. Code Ann. § 5-4-617(i) & (j). As pertinent here, the Act permits ADC to make available to the public the following information, so long as the identification of the seller, supplier, or testing laboratory is redacted and maintained as confidential: package inserts and labels, if the drugs used in the protocol have been made by a manufacturer approved by the FDA; reports obtained from independent testing laboratories; and ADC's procedure for administering the drugs, including the contents of the lethal-injection drug box.

The Prisoners first filed suit in April 2015 against ADC in the Pulaski County Circuit Court, challenging the constitutionality of the Act. ADC removed the action to federal

court. However, the Prisoners promptly dismissed the federal case without prejudice and returned to the circuit court with the filing of an amended complaint, asserting claims only under the Arkansas Constitution. In response to a motion to dismiss filed by ADC, the Prisoners filed the present action under a new case number.

During the course of the litigation, ADC informed the prisoners of its intent to execute them using the three-drug combination of Midazolam, vecuronium bromide, and potassium chloride. In connection with that disclosure, ADC provided to the Prisoners package inserts and labels for the drugs, redacting the identity of the supplier of the drugs, in accordance with the Act. ADC also provided the Prisoners with the lethal-injection protocol to be used in the executions. The protocol calls for a total dose of 500 milligrams of Midazolam, 100 milligrams of vecuronium bromide, and 240 milliequivalents of potassium chloride. On September 9, 2015, the State set execution dates for each of the Prisoners, except Ledell Lee. On application of the Prisoners, the circuit court issued a temporary restraining order staying the scheduled executions. On October 20, 2015, this court granted ADC's petition for writ of certiorari to lift the stays of execution erroneously ordered by the circuit court, based on the holding that a circuit court, in no uncertain terms, lacks the authority to stay executions. *Kelley v. Griffen*, 2015 Ark. 375, 472 S.W.3d 135. However, we simultaneously granted the Prisoners' request to stay their executions pending the resolution of the underlying litigation. *Id.*

Meanwhile, on September 28, 2015, the Prisoners filed an amended complaint, which is the operative pleading at issue in this appeal. The amended complaint contains separate causes of action that fall into two categories: claims challenging the constitutionality

of the Act's nondisclosure provisions regarding the identity of the supplier of the drugs, and claims challenging the constitutionality of the selected method of execution. Each claim is made under the Arkansas Constitution. With respect to nondisclosure, the Prisoners alleged that the confidentiality provisions of the Act (1) violate the Contract Clause, found at article 2, section 17, by impairing the disclosure obligations undertaken by ADC in the June 2013 settlement agreement; (2) offend the freedoms of speech and of the press guaranteed by article 2, section 6; (3) violate their rights to procedural protections that are part of the Cruel or Unusual Punishment Clause set forth in article 2, section 9; (4) transgress the right to procedural due process under article 2, section 8; (5) violate separation of powers by precluding adequate judicial review of the means of execution; and (6) are contrary to the Publication Clause found at article 19, section 12. Regarding the means of execution, the Prisoners alleged that (1) implementation of the Act violates the right of substantive due process found in article 2, section 8 of the Arkansas Constitution; (2) the Act violates separation of powers under article 4 by delegating unfettered discretion to ADC; (3) execution using either the three-drug-Midazolam protocol, compounded drugs, or electrocution constitutes cruel or unusual punishment under article 2, section 9; and (4) the Act violates the Ex Post Facto Clause of article 2, section 17.

ADC filed a motion to dismiss the amended complaint on the ground of sovereign immunity. In the motion, ADC argued that the Prisoners' claims were barred by sovereign immunity because the complaint failed to state cognizable claims of any constitutional violation. In an order dated October 9, 2015, the circuit court dismissed the Prisoners' separation-of-powers claim as to the allegation of improper delegation of authority, based

on this court's decision in *McGehee*, *supra*, but the court denied the motion to dismiss with regard to the contract-clause claim, the freedom-of-speech and press claim, the claims regarding procedural due process, the separation-of-powers claim with respect to the function of the judiciary, and the method-of-execution claims that the lethal-injection procedure violates the ban on cruel or unusual punishment and the alleged right of substantive due process to be free of objectively unreasonable risks of substantial and unnecessary pain and suffering.

ADC subsequently filed a motion asking the circuit court to address its request for dismissal with regard to three of the Prisoners' claims that the circuit court had neglected to rule on in its October 9, 2015 order. On October 22, 2015, the circuit court entered a supplemental order to provide a decision concerning the omitted claims. The court dismissed the Prisoners' contention that the Act violated the ex post facto clause of the Arkansas Constitution, but the court denied the motion to dismiss the claim regarding the publication clause of the Arkansas Constitution and the due-process claim asserted in conjunction with the allegation of cruel or unusual punishment. The circuit court also ruled that the Prisoners had pled sufficient facts demonstrating feasible alternatives to the current method of execution. ADC filed a notice of appeal from the two orders ruling on their motion to dismiss.

The Prisoners moved for partial summary judgment, and ADC moved for summary judgment on all the remaining claims asserted by the Prisoners. In its motion, ADC argued that it was entitled to summary judgment on grounds of sovereign immunity because the Prisoners had not proved viable claims of any constitutional violation. The circuit court

entered an order on December 3, 2015, granting summary judgment on the disclosure claims and denying summary judgment on the means-of-execution claims. Specifically, the court granted ADC's motion for summary judgment on the remaining separation-of-powers claim. The circuit court granted the Prisoners' motion for summary judgment on their contract-clause claim, their claim regarding freedoms of speech and the press, their claims regarding due process, and the publication-clause claim. The circuit court denied ADC summary judgment on the Prisoners' substantive due-process claim and the cruel-or-unusual-punishment claim, ruling that those issues could not be decided as a matter of law because material questions of fact remained in dispute. ADC filed a timely notice of appeal from this order.

The parties also litigated the question of a protective order. In its December 3, 2015 order, the circuit court denied ADC's request for a protective order and directed it to identify the manufacturer, seller, distributor, and supplier of any lethal-injection drugs to be used in executions by no later than noon on December 4, 2015. On December 3, 2015, ADC applied to this court for an immediate stay of the circuit court's order. On that same day, we granted a temporary stay of the circuit court's disclosure order pending briefing. On January 7, 2016, we issued an immediate stay of all proceedings in the circuit court during the pendency of this appeal.

II. *Propriety of the Appeal*

In their brief, the Prisoners contend that this court lacks jurisdiction to hear the appeal because the circuit court did not specifically rule on the issue whether ADC is entitled to sovereign immunity. In response, ADC argues that the appeal is proper because sovereign

immunity was the sole basis on which it moved for dismissal and for summary judgment and that the circuit court has ruled on all the issues raised in their motions.

The general rule is that the denial of a motion for summary judgment is neither reviewable nor appealable. Ark. R. App. P.–Civ. 2(a)(10); *Bd. of Trs. v. Pulaski Cty.*, 2013 Ark. 230. However, Rule 2(a)(10) of the Arkansas Rules of Appellate Procedure–Civil permits an appeal from an interlocutory "order denying a motion to dismiss or for summary judgment based on the defense of sovereign immunity." The rationale justifying an interlocutory appeal is that the right to immunity from suit is effectively lost if the case is permitted to go to trial. *Ark. State Claims Comm'n v. Duit Constr. Co.*, 2014 Ark. 432, 445 S.W.3d 496.

As we have explained, sovereign immunity is jurisdictional immunity from suit, and jurisdiction must be determined entirely from the pleadings. *Fitzgiven v. Dorey*, 2013 Ark. 346, 429 S.W.3d 234. This defense arises from article 5, section 20 of the Arkansas Constitution, which provides: "The State of Arkansas shall never be made a defendant in any of her courts." This court has extended the doctrine of sovereign immunity to include state agencies. *Ark. Dep't of Cmty. Corr. v. City of Pine Bluff*, 2013 Ark. 36, 425 S.W.3d 731. In determining whether the doctrine of sovereign immunity applies, the court should determine if a judgment for the plaintiff will operate to control the action of the State or subject it to liability. *Ark. Dep't of Human Servs. v. Fort Smith Sch. Dist.*, 2015 Ark. 81, 455 S.W.3d 294. If so, the suit is one against the State and is barred by the doctrine of sovereign immunity, unless an exception to sovereign immunity applies. *Ark. Dep't of Envtl. Quality v. Al-Madhoun*, 374 Ark. 28, 285 S.W.3d 654 (2008). This court has recognized three ways

in which a claim of sovereign immunity may be surmounted: (1) the State is the moving party seeking specific relief; (2) an act of the legislature has created a specific waiver of sovereign immunity; or (3) the state agency is acting illegally, unconstitutionally, or if a state-agency officer refuses to do a purely ministerial action required by statute. *Bd. of Trs. v. Burcham*, 2014 Ark. 61. The third exception is at issue in this appeal.

In arguing that the appeal is improper, the Prisoners refer to our decision in *Arkansas Lottery Commission v. Alpha Marketing*, 2012 Ark. 23, 386 S.W.3d 400, where we held that, before an interlocutory appeal may be taken under Rule 2(a)(10), a circuit court must provide a ruling on the defense of sovereign immunity. In that case, Alpha Marketing had filed a declaratory-judgment action against the Lottery Commission claiming that it was entitled to the exclusive use of certain trademarks that had been registered to it. Alpha Marketing also asserted that the Lottery Commission was infringing on its trademarks, and as relief, it sought damages for lost profits and an injunction to prohibit the Lottery Commission from manufacturing, using, displaying, or selling any imitations of its registered trademarks. The Lottery Commission moved to dismiss the complaint on multiple grounds, including arguments that the trademark registrations had been improperly granted and that the marks were not entitled to trademark protection. In addition, the Lottery Commission moved for dismissal on the independent ground that the doctrine of sovereign immunity barred Alpha Marketing's request for damages and injunctive relief for trademark infringement. In a detailed written order, the circuit court denied the Lottery Commission's motion to dismiss regarding its arguments that Alpha Marketing had not stated a valid cause of action for trademark infringement. However, the court did not rule on the Lottery

Commission's contention that the relief sought by Alpha Marketing was barred by sovereign immunity. Because the circuit court did not rule on the defense of sovereign immunity, and because only that claim is subject to an interlocutory appeal, we dismissed the appeal for the lack of an express ruling on the separate issue of immunity.

Here, the circuit court did rule on the issue of sovereign immunity. Therefore, *Alpha Marketing* does not warrant the dismissal of this interlocutory appeal. In moving to dismiss and for summary judgment, ADC argued that it was entitled to judgment as a matter of law on the basis of sovereign immunity because the Prisoners failed either to plead or to prove viable and cognizable claims to demonstrate the unconstitutionality of the Act. In its orders, the circuit court accepted a few of ADC's arguments, while rejecting others. Thus, the circuit court ruled on each and every contention advanced by ADC to support its defense of sovereign immunity. This appeal contests the court's adverse rulings. By explicitly rejecting ADC's asserted grounds for being immune from suit, the court did, in fact, rule on the issue of sovereign immunity. Consequently, jurisdiction lies over this interlocutory appeal.

III. *Method of Execution*

As its opening argument on appeal, ADC asserts that the Prisoners failed to plead and to prove that the use of the three-drug Midazolam protocol imposes cruel or unusual punishment, as prohibited by article 2, section 9 of the Arkansas Constitution. It argues that the Prisoners did not meet their burden of establishing either that the alternative execution methods proposed by the Prisoners in their amended complaint are feasible and readily implemented by the ADC or that a 500-milligram intravenous dose of Midazolam is sure

or very likely to cause needless suffering. The Prisoners respond that they pled sufficient facts regarding the alternative methods of execution and that a genuine factual dispute remains on that issue, as well as the question whether the Midazolam protocol causes a demonstrated risk of severe pain.

The law is well settled regarding the standard of review used by this court in reviewing a grant of summary judgment. *Fed. Nat'l Mortg. Ass'n v. Taylor*, 2015 Ark. 78, 455 S.W.3d 811. A circuit court will grant summary judgment only when it is apparent that no genuine issues of material fact exist requiring litigation and that the moving party is entitled to judgment as a matter of law. *Quarles v. Courtyard Gardens Health & Rehab., LLC*, 2016 Ark. 112, ___ S.W.3d ___. "[W]e only approve the granting of the motion when the state of the evidence as portrayed by the pleadings, affidavits, discovery responses, and admissions on file is such that the nonmoving party is not entitled to a day in court, i.e., when there is not any genuine remaining issue of fact and the moving party is entitled to judgment as a matter of law." *Town of Lead Hill v. Ozark Mountain Reg'l Pub. Water Auth.*, 2015 Ark. 360, at 3, 472 S.W.3d 118, 121–22 (quoting *Flentje v. First Nat'l Bank of Wynne*, 340 Ark. 563, 569–70, 11 S.W.3d 531, 536 (2000)). The standard is whether the evidence is sufficient to raise a factual issue, not whether the evidence is sufficient to compel a conclusion. *Talbert v. U.S. Bank*, 372 Ark. 148, 271 S.W.3d 486 (2008); *see also Hardin v. Bishop*, 2013 Ark. 395, 430 S.W.3d 49. The object of summary-judgment proceedings is not to try the issues, but to determine if there are any issues to be tried, and if there is any doubt whatsoever, the motion should be denied. *Walls v. Humphries*, 2013 Ark. 286, 428 S.W.3d 517.

On review, this court determines if summary judgment was appropriate based on whether the evidence presented in support of summary judgment leaves a material question of fact unanswered. *Lipsey v. Giles*, 2014 Ark. 309, 439 S.W.3d 13. We view the evidence in the light most favorable to the party against whom the motion was filed, resolving all doubts and inferences against the moving party. *Hotel Assocs., Inc. v. Rieves, Rubens & Mayton*, 2014 Ark. 254, 435 Ark. 488.

When reviewing a circuit court's decision on a motion to dismiss, we treat as true the facts alleged in the complaint and view them in the light most favorable to the plaintiff. *Key v. Curry*, 2015 Ark. 392, 473 S.W.3d 1. In testing the sufficiency of a complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Sanford v. Walther*, 2015 Ark. 285, 467 S.W.3d 139. This court's rules require fact pleading, and a complaint must state facts, not mere conclusions, in order to entitle the pleader to relief. *Ballard Grp., Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, 436 S.W.3d 445.

Article 2, section 9 of our constitution provides that "cruel or unusual punishments [shall not] be inflicted." ADC's arguments under this point are based on the United States Supreme Court's decisions in *Baze v. Rees*, 553 U.S. 35 (2008), and *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726 (2015), where the Court addressed the substantive elements of method-of-execution claims under the Eighth Amendment. To prevail on such a claim, a prisoner bears the burden of proving two distinct but interrelated propositions. First, he must establish that the method presents a risk that is "*sure or very likely* to cause serious illness and needless suffering" and that gives rise to "sufficiently *imminent* dangers." *Baze*, 553 U.S.

at 50 (quoting *Helling v. McKinney*, 509 U.S. 25, 33, 34–35 (1993)). The Court explained that there must be a "substantial risk of serious harm" or an "objectively intolerable risk of harm" associated with the method of execution that prevents prison officials from pleading that they were "subjectively blameless for purposes of the Eighth Amendment." *Id.* (quoting *Farmer v. Brennan*, 511 U.S. 825, 842, 846 & n.9 (1994)). Second, a prisoner must prove that "any risk posed by the challenged method is substantial when compared to known and available alternative methods of execution." *Glossip*, 135 S. Ct. at 2737–38. Under this prong of the test, a prisoner "must identify an alternative that is 'feasible, readily implemented, and in fact significantly reduce[s] a substantial risk of severe pain.'" *Id.* at 2737 (quoting *Baze*, 553 U.S. at 52). This burden is not met "by showing a slightly or marginally safer alternative." *Id.*

In setting these standards, the Court recognized that, because capital punishment is constitutional, "[i]t necessarily follows that there must be a [constitutional] means of carrying it out." *Glossip*, 135 S. Ct. at 2732–33 (quoting *Baze*, 553 U.S. at 47). The standards were also shaped by the Court's dual observations that, "because some risk of pain is inherent in any method of execution, we have held that the Constitution does not require the avoidance of all risk of pain" and that "[h]olding that the Eighth Amendment demands the elimination of essentially all risk of pain would effectively outlaw the death penalty altogether." *Id.* at 2733.

As we have noted in the past, this court has interpreted article 2, section 9 in a manner that is consistent with precedents under federal law regarding the Eighth Amendment. *See Bunch v. State*, 344 Ark. 730, 43 S.W.3d 132 (2001). In *Bunch*, we said that we will continue

to do so unless a party offers "legal authority or persuasive argument to change our legal course." *Id.* at 739, 43 S.W.3d at 138. In this case, the Prisoners urge us to disavow the requirement established in *Baze*, as amplified by the Court in *Glossip*, that a prisoner bears the burden of proving a known and available alternative to a state's current execution protocol. They assert that we should construe our provision differently because the Eighth Amendment uses the words "cruel *and* unusual punishment," whereas the Arkansas Constitution contains the disjunctive phrase "cruel *or* unusual punishment." As the Court made clear in *Glossip*, the burden of showing a known and available alternative is a substantive component of an Eighth Amendment method-of-execution claim. We are not convinced that the slight variation in phraseology between the two constitutions denotes a substantive or conceptual difference in the two provisions that would compel us to disregard any part of the test governing a challenge to a method of execution. Accordingly, we decline the Prisoners' invitation to depart from our practice of interpreting our constitutional provision along the same lines as federal precedent, and we hereby adopt the standards enunciated in both *Baze* and *Glossip*. Accordingly, in challenging a method of execution under the Arkansas Constitution, the burden falls squarely on a prisoner to show that (1) the current method of execution presents a risk that is sure or very likely to cause serious illness and needless suffering and that gives rise to sufficiently imminent dangers; and (2) there are known, feasible, readily implemented, and available alternatives that significantly reduce a substantial risk of severe pain. We now proceed to a discussion of ADC's arguments that are based on these standards.

ADC first contends that the Prisoners failed to meet their burden of pleading and proving that their proposed alternative methods of execution are feasible and capable of being readily implemented. In opposing this argument, the Prisoners maintain that they sufficiently pled five alternatives to the Midazolam protocol and that, for purposes of summary judgment, they presented sufficient evidence to support their contention that the alternative methods are known and readily available for use.

In their amended complaint, the Prisoners pled that a number of alternative execution procedures are available that would significantly reduce the risk of pain and suffering than the use of the Midazolam protocol. First, the Prisoners proposed execution by firing squad as an alternative. They supported this allegation with the affidavit of Dr. Jonathan Groner, who stated that execution by firing squad, if skillfully performed, would result in "nearly instantaneous and painless death" because "[d]isruption of blood flow to the brain, which would result from lacerations to the heart by multiple bullets, causes almost immediate loss of consciousness, resulting in rapid death with little or no pain." In addition to the firing squad, the Prisoners advocated the use of a massive dose of an FDA-approved, fast-acting barbiturate, such as Brevital and Nembutal. They also offered the option of a massive dose of an anesthetic gas, namely sevoflurane, desflurane, or isoflurane. In addition, the Prisoners proposed the use of a massive dose of an injectable opioid, such as Sublimaze, or a massive dose of a transdermal patch like Duragesic. The Prisoners supported the use of these lethal agents with the report of Dr. Craig Stevens, who holds a doctorate in pharmacology. Stevens opined in his report that any of these drug protocols would produce

a rapid and painless death. Further, he identified the manufacturers of the various drugs and stated that the drugs were commercially available.[2]

To counter the Prisoners' proposed alternatives, ADC presented the affidavits of Executive Director Kelley and of Rory Griffin, ADC's deputy director. In her affidavit, Kelley stated that, before the current protocol was adopted, she had made unsuccessful attempts to obtain a barbiturate to use in carrying out capital punishment by lethal injection. Kelley said that potential suppliers of lethal drugs declined to sell them to the ADC, and she explained that the sellers were concerned about adverse publicity and the loss of business if they were identified as suppliers of drugs used for executions. She further stated that the supplier who sold the FDA-approved drugs currently in ADC's possession agreed to sell the drugs only after receiving a copy of the Act and confirming that ADC is required by law to keep its identity confidential, unless ordered to disclose the information in litigation. Finally, she averred that the supplier has taken the position that it will not provide any additional drugs for use in executions and that she is unaware of the identity of any supplier or manufacturer that will sell drugs for use in executions.

In his affidavit, Griffin stated that he had conducted an investigation into the availability of drugs for use in executions. The investigation consisted of a series of phone calls Griffin made the day before swearing out the affidavit. He reported that Akorn Inc. was not willing to sell Nembutal Sodium Solution for that purpose and that Akorn requires its buyers to sign a form stating that they will not divert Akorn's products to any department

[2] The Prisoners attached and incorporated Groner's affidavit and Stevens's report into the amended complaint.

of correction. Griffin reported the same information with respect to the drug Brevital after contacting a representative of Par Pharmaceuticals. He inquired of Baxter Health Corp. about the anesthetic gases of desflurane and isoflurane and was told that Baxter was not willing to sell the gases for executions. Griffin stated that he contacted Jannsen Pharmaceuticals Co. about Sublimaze and Duragesic patches. He was advised to relay his questions in writing and that he could expect a response from them in six to eight weeks. Griffin said that he submitted a written request but that he had not received a response. Griffin stated that he also contacted a wholesale distributor from Louisiana, Morris & Dickson Co., LLC. Paul Dickson, the owner, reported that he would have to obtain approval from the manufacturers before selling drugs to ADC for use in executions.

ADC contends that the Prisoners failed to "plead and prove" that the proposed alternative methods of execution to the Midazolam protocol are feasible and readily implemented by the ADC, as required under the decision in *Glossip*. However, we observe that the procedural posture of *Glossip* is much different from that which is involved in this appeal, which comes to us from motions to dismiss and for summary judgment. In *Glossip*, the case involved the prisoners' request for a preliminary injunction that was denied after a three-day evidentiary hearing. The Supreme Court's decision upholding the findings of the lower court approving the Midazolam protocol was based on the evidence developed in that record and the Court's application of its deferential standard of review to the lower court's findings. This places the Court's statement that the "Eighth Amendment requires a prisoner to *plead and prove* a known and available alternative" in its proper context. *Glossip*, 135 S. Ct. at 2739. Nonetheless, we agree with ADC that the Prisoners have not met their

burden of demonstrating, even at this stage of the proceedings, that the proposed alternative drugs are available to ADC for use in an execution. In their amended complaint, the Prisoners pled only that the drugs they offered as alternatives were "commercially available." That the drugs are generally available on the open market says nothing about whether ADC, as a department of correction, is able to obtain the drugs for the purpose of carrying out an execution. Consequently, the Prisoners failed to even allege that the proposed drug protocols are "feasible" and "readily implemented" by ADC. Accordingly, the circuit court erred in concluding that the Prisoners pled sufficient facts as to the proposed alternative drugs.

We reach the same result with respect to the Prisoners' alternative method of a firing squad. In their effort to show that death by firing squad significantly reduces a substantial risk of severe pain, the Prisoners pled that this method would result in instantaneous and painless death. In terms of whether this method is capable of ready implementation, the Prisoners merely alleged in their amended complaint that ADC has firearms, bullets, and personnel at its disposal to carry out an execution. However, these allegations are entirely conclusory in nature. Conclusory statements are not sufficient under the Arkansas Rules of Civil Procedure, which identify Arkansas as a fact-pleading state. *Worden v. Kirchner*, 2013 Ark. 509, 431 S.W.3d 243; *Born v. Hosto & Buchan, PLLC*, 2010 Ark. 292, 372 S.W.3d 324. In this case, the Prisoners failed to substantiate the conclusory allegations contained in their amended complaint.

We wish to emphasize that merely reciting bare allegations is not sufficient to show that a firing squad is a readily implemented alternative. The law in Arkansas calls for

execution by means of intravenous lethal injection. Ark. Code Ann. § 5-4-617(a). The other authorized method is electrocution, which is to be utilized only after execution by lethal injection is invalidated by a final and unappealable order. Ark. Code Ann. § 5-4-617(k). Execution by firing squad is not identified in the statute as an approved means of carrying out a sentence of death. As such, this proposal does not comply with the current statutory scheme. In our history, the General Assembly has never seen fit to authorize this form of execution. For these reasons, it cannot be said that the use of a firing squad is a readily implemented and available option to the present method of execution. *See Boyd v. Myers*, No. 2:14-CV-1017, 2015 WL 5852948 (WKW) (M.D. Ala. Oct. 7, 2015). As a consequence, ADC was entitled to dismissal on this proposed alternative.

Because the Prisoners failed to satisfy this prong of the test for establishing a claim of cruel or unusual punishment, the circuit court erred by denying ADC's request for dismissal of the Prisoners' method-of-execution challenge. Consequently, we reverse and dismiss the Prisoners' claim.

Before leaving this point on appeal, we must address the Prisoners' assertion that the Midazolam protocol violates the substantive component of article 2, section 8 of the Arkansas Constitution because the lethal-injection procedure using Midazolam entails objectively unreasonable risks of substantial and unnecessary pain and suffering. On this issue, the circuit court ruled that the Prisoners need not satisfy the requirement of offering a feasible and readily implemented alternative to the Midazolam protocol. We agree with ADC's contention that this claim must be analyzed under the two-part test we have herein adopted for method-of-execution challenges. "If a constitutional claim is covered by a

specific constitutional provision, such as the Fourth or Eighth Amendment, the claim must be analyzed under the standard appropriate to that specific provision, not under the rubric of substantive due process." *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997) (citing *Graham v. Connor*, 490 U.S. 386 (1989)). In applying this principle, courts have concluded that an Eighth Amendment claim that is conterminous with a substantive due-process claim supersedes the due-process claim. *Curry v. Fed. Bureau of Prisons*, No. 05-CV-2781, 2007 WL 2580558 (PJS/JSM) (D. Minn. September 5, 2007) (collecting cases); *see also Oregon v. Moen*, 786 P.2d 111, 143 (Or. 1990) (recognizing that "if the imposition of the death penalty satisfies the Eighth Amendment, it also satisfies substantive due process"). This claim also fails because, as we have discussed, the Prisoners failed to establish the second prong of the *Glossip* test.[3]

IV. *Confidentiality*

In this appeal, ADC also contests the circuit court's ruling—that the Act's provision keeping the identification of the drug supplier confidential—offends the Arkansas Constitution on a number of grounds. The circuit court determined that disclosure of the supplier is compelled as a matter of procedural due process and that the confidentiality requirement violates the provision regarding freedom of speech and of the press, the contract clause, and the publication clause.

[3] In its brief, ADC presents the argument that the Prisoners' claims of cruel or unusual punishment concerning the electric chair and compounded drugs are speculative and not ripe for review. We agree that the scope of our review is limited to the three-drug protocol that ADC has chosen as the current method of execution.

These questions appear to be moot. However, we address them under the exception to the mootness doctrine as concerning issues that raise considerations of substantial public interest which, if addressed, would prevent future litigation. *Gray v. Mitchell*, 373 Ark. 560, 285 S.W.3d 222 (2008). "Where considerations of public interest or prevention of future litigation are present," this court may, at its discretion, "elect to settle an issue, even though moot." *Owens v. Taylor*, 299 Ark. 373, 374, 772 S.W.2d 596, 597 (2008). We discuss each issue in turn.[4]

A. Procedural Due Process

In their amended complaint, the Prisoners asserted that the right of due process found in article 2, section 8 of our constitution compels disclosure of the identity of the supplier of the drugs. Article 2, section 8 provides that no person "shall be deprived of life, liberty, or property, without due process of law." The argument made by the Prisoners is based on the notion that the fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner. *See Washington v. Thompson*, 339 Ark. 417, 6 S.W.3d 82 (1999). Thus, they contend that, if the State proposes to deprive them

[4] In dissent, Justice Hart is mistaken in her belief that the disclosure claims cannot be considered because ADC has presented no separate argument contesting the circuit court's denial of its request for a protective order. ADC filed its motion seeking a protective order in response to the circuit court's scheduling order requiring disclosure of the supplier of the drugs following the court's denial in part of ADC's motion to dismiss. The request for a protective order was made in accordance with the Act and was not presented in connection with its claims of sovereign immunity. Therefore, the denial of the motion for protective order was not subject to being appealed on an interlocutory basis pursuant to Rule 2(a)(10). Otherwise, an appeal from the denial of a protective order is not granted as a matter of right under Rule 2(f). Instead, this court may, in its discretion, accept review and only when a circuit court makes the findings required by the rule. The circuit court made no findings in this instance to support an interlocutory appeal.

of their lives, they are entitled to a meaningful opportunity to challenge the deprivation. Consequently, the Prisoners argue that the disclosure of the identity of the supplier is essential for them to have a meaningful opportunity to litigate their claim of cruel or unusual punishment. ADC contends that the circuit court erred by accepting this argument to require disclosure. We agree.

To sustain their allegation that the Midazolam protocol violates the ban on cruel or unusual punishment, it is incumbent on the Prisoners to show that the method of execution presents a risk that is sure or very likely to cause serious illness and needless suffering and that gives rise to sufficiently imminent dangers. However, the Prisoners have failed to establish that the identity of the supplier of the drugs bears any relevance to that claim. Here, the provenance of the drugs is not in question. ADC voluntarily submitted the drugs it had obtained to an independent laboratory for testing. The test results confirmed that the contents of the vials match the FDA-approved labeling and revealed that all three drugs meet applicable potency requirements. In light of this evidence, identifying the supplier of the drugs serves no useful purpose in establishing the Prisoners' claim. Discovering the identity of the supplier does not aid their cause, nor will the lack of knowledge hinder their ability to prove their contention that the protocol is constitutionally suspect. The circuit court clearly erred in ruling that disclosure is required as a matter of due process. We are in agreement with other courts who have reached a similar conclusion. *See, e.g.*, *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015); *Wellons v. Comm'r*, 754 F.3d 1260 (11th Cir. 2014); *In re Lombardi*, 741 F.3d 888 (8th Cir. 2014); *Sepulvado v. Jindal*, 729 F.3d 413 (5th Cir. 2013); *Valle v. Singer*, 655 F.3d 1223 (11th Cir. 2011); *Phillips v. DeWine*, 92 F. Supp.

3d 702 (S.D. Ohio 2015); *Pardo v. State*, 108 So. 3d 558 (Fla. 2012); *Lockett v. Evans*, 330 P.3d 488 (Okla. 2014); *West v. Schofield*, 460 S.W.3d 113 (Tenn. 2015). Accordingly, we reverse the circuit court's decision on this point.

In their amended complaint, the Prisoners also asserted that the substantive right to be free from cruel or unusual punishment implies certain procedural safeguards, which include access to information necessary to determine a violation of that right. They alleged that the Act violates this implied procedural protection by restricting access to information that leads to the identification of the persons or entities who supply lethal-injection drugs. The question whether the right to be free from cruel or unusual punishment includes a complementary right of due process is an issue of first impression in our court. However, we need not resolve that question in this appeal. It is enough to say that, based on the foregoing discussion, the Prisoners have failed to demonstrate that the identity of the supplier of the drugs is germane to their cruel-or-unusual-punishment claim. Consequently, we also reverse on this issue.

B. Liberty of Speech and of the Press

In this point on appeal, ADC contends that the circuit court erred in concluding that the Prisoners satisfied their burden of proving the elements of their claim that is made pursuant to article 2, section 6 of the constitution. In support of the circuit court's decision that disclosure is required under this provision, the Prisoners contend that the State has a tradition of publicizing information about the suppliers of execution drugs and that openness and debate are essential to the functioning of the criminal-justice system, including the implementation of the death penalty.

Article 2, section 6 governs the rights of free speech and freedom of the press, and it is Arkansas's equivalent to the First Amendment. To determine whether a First Amendment right of access attaches to a particular proceeding, courts consider "whether the place and process have historically been open to the press and general public" and "whether public access plays a significant positive role in the functioning of the particular process in question." *Press-Enter. Co. v. Superior Court*, 478 U.S. 1, 8 (1986). This right of access is not absolute. *Id.*

From our review of the record, even if it may be said that there is a tradition in Arkansas of identifying the supplier of drugs used in executions, we cannot conclude that disclosure is compelled under the second prong of the test. As revealed in the decisions of *Baze* and *Glossip*, it has become a matter of common knowledge that states which sanction capital punishment have encountered increasing difficulties in obtaining drugs that are used to carry out the sentence of death by lethal injection. The undisputed affidavits of Kelley and Griffin reflect this predicament by demonstrating ADC's own obstacles to acquiring the drugs and the unwillingness of suppliers to sell the drugs to a department of correction. As stated by Kelley, the current supplier of the drugs agreed to provide them only on the condition of anonymity, and that supplier is no longer inclined to sell the drugs to ADC. Griffin's affidavit also shows that manufacturers prohibit distributors from selling the drugs to departments of correction. Given the practical realities of the situation, as borne out by this record, the circuit court erred in ruling that public access to the identity of the supplier of the three drugs ADC has obtained would positively enhance the functioning of executions in Arkansas. As has been well documented, disclosing the information is actually

detrimental to the process. *See Zink*, 783 F.3d at 1113 (holding that public access to the identity of suppliers of drugs for lethal injections does not play a significant role in the functioning of the process "given that the practical effect of public disclosure would likely be frustration of the State's ability to carry out a lawful sentence"). Disclosure is not required as a matter of free speech. *See Wellons*, *supra*; *Phillips*, *supra*.

In concluding this issue, we observe that the General Assembly has declared, as a matter of public policy, that capital murder may be punishable by death. As recognized by the Supreme Court, a state "has a legitimate interest in carrying out a sentence of death in a timely manner." *Baze*, 553 U.S. at 61. In aid of that process, the General Assembly has determined that there is a need for confidentiality.[5] The question whether the enactment is wise or expedient is a matter exclusively for the General Assembly to decide. *State v. Martin*, 60 Ark. 353, 30 S.W. 421 (1895). We reverse the circuit court's ruling on this issue.[6]

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[5] Arkansas is not alone in adopting legislation imposing confidentiality requirements with regard to executions by lethal injection. *See* Ariz. Rev. Stat. Ann. § 13-757(C) (2010); Ga. Code Ann. § 42-5-36(d)(2) (2014); Fla. Stat. Ann. § 945.10(1)(g) (2014); La. Stat. Ann. § 15:570(G) (2014); Mo. Ann. Stat. § 546.720 (2007); Ohio Rev. Code Ann. § 2949.221 (2015); Okla. Stat. Ann. tit. 22, § 1015 (2016); S.D. Codified Laws § 23A-27A-31.2 (2014); Tenn. Code Ann. § 10-7-504(h)(1) (2016). Courts that have addressed the issue have upheld the laws keeping the identity of the supplier of lethal-injection drugs confidential. *Phillips*, *supra*; *Owens v. Hill*, 758 S.E.2d 794 (Ga. 2014); *Bryan v. State*, 753 So. 2d 1244 (Fla. 2000); *Evans*, *supra*.

[6] In connection with this point on appeal, the Prisoners filed a motion to strike the portion of ADC's reply brief where it cited *Houchins v. KQED, Inc.*, 438 U.S. 1 (1978), to argue that the First Amendment does not provide a right of access to documents that are not open to the public generally. The Prisoners contend that this discussion should be struck because ADC is raising a new argument in the reply brief, a practice that is not countenanced by this court. *See JurisDictionUSA, Inc. v. Loislaw.com, Inc.*, 357 Ark. 403, 83

C. Contract Clause

The contract clause is found in article 2, section 17 of the constitution, and it provides that "[n]o . . . law impairing the obligation of contracts shall ever be passed." Under this point, ADC asserts that the Act does not offend the contract clause because the settlement agreement the Prisoners rely on to require disclosure of the identity of the supplier applied only to litigation that has since been concluded. Alternatively, it argues that the contract clause is not absolute and that the Act is a valid exercise of police power. ADC's first argument has merit, which obviates the need for us to discuss the second contention.

The settlement agreement at issue was entered into by ADC and the Prisoners, with the exception of Ledell Lee, in connection with their previous lawsuit, designated as Case No. 60-CV-13-1794, challenging the validity of Act 139 of 2013 and the lethal-injection protocol that had been adopted pursuant to that legislation in April 2013. The agreement also touched on a separate action, Case No. 60CV-13-1204, involving a FOIA request where the circuit court had ruled in favor of ADC but had not yet issued a final order. According to the settlement agreement, ADC had decided to not use the April 2013 execution protocol, which rendered moot the Prisoners' as-applied constitutional challenges to the protocol. As its purpose, the parties "agreed that the pending litigation between them can be streamlined in a manner that allows for the efficient litigation of their disputes." To that end, the Prisoners agreed to amend their complaint concerning Act 139 to omit their

S.W.3d 560 (2004) (observing that a new issue may not be raised for the first time in the appellant's reply brief). Given our disposition of this issue, the motion to strike is moot.

as-applied claims with the understanding from ADC that, "in the event that ADC adopts a new lethal-injection protocol before Case No. 60CV-13-1794 has been litigated to a final judgment," the Prisoners had the right to amend their complaint to reassert as-applied challenges to the new lethal-injection procedure without ADC asserting the defense of res judicata. ADC also agreed to not raise that defense if the Prisoners initiated a separate lawsuit to present as-applied challenges to "ADC's new protocol" on the ground "that such claims are barred because they should have been asserted in Case No. 60CV-13-1794 or Case No. 60CV-13-1204." The settlement agreement contained the following disclosure requirements:

> The defendants agree that, within 10 business days after ADC adopts a new lethal-injection protocol, ADC will provide a copy of the new protocol to counsel for the plaintiffs. In addition, the defendants agree that, within 10 days after they obtain possession of any drugs that ADC intends to use in a lethal-injection procedure, the defendants will notify the plaintiffs' counsel that it has obtained the drugs and will specify which drugs have been obtained and disclose the packaging slips, package inserts, and box labels received from the supplier.

In the case at bar, our object is to ascertain the intention of the parties, not from particular words or phrases, but from the entire context of the agreement. *HPD, LLC v. Tetra Techs., Inc.*, 2012 Ark. 408, 424 S.W.3d 304. In interpreting the meaning of a contract, the first rule of construction is to give to the language the meaning that the parties intended. *Asbury Auto. Used Car Ctr. v. Brosh*, 2009 Ark. 111, 314 S.W.3d 275. To arrive at the intention of the parties to a contract, courts may acquaint themselves with the persons and circumstances and place themselves in the same situation as the parties who made the contract. *Schnitt v. McKellar*, 244 Ark. 377, 427 S.W.2d 202 (1968).

Judged by these standards, we hold that the settlement agreement does not require the disclosure of the identity of the supplier of the drugs used in the present lethal-injection protocol. The agreement reflects that the parties were in the midst of litigation concerning Act 139 of 2013 that allowed execution by means of a benzodiazepine followed by a barbiturate. It is clear that the disclosures required by the agreement with respect to any new protocol were tied to those adopted pursuant to the 2013 Act. The settlement agreement cannot be read as expressing an intention to create a continuing obligation on the part of ADC to make similar disclosures based on protocols adopted in accordance with not yet conceived future legislation. The circuit court's interpretation of the agreement does not reflect the parties' intent, so we must reverse its decision that the Act violated the contract clause. Because there is no existing contractual obligation of disclosure, the Act cannot offend the contract clause of the constitution.

D. Publication Clause

Article 19, section 12 of the Arkansas Constitution provides,

> An accurate and detailed statement of the receipts and expenditures of the public money, the several amounts paid, to whom and on what account, shall, from time to time, be published as may be prescribed by law.

In contesting the circuit court's decision that the confidentiality requirement of the Act violates the constitution, ADC contends that the phrase, "as may be prescribed by law," indicates that the provision is not self-executing and thus does not give rise to a private cause of action. Again emphasizing that phrase, it argues that the General Assembly has the authority to prescribe the time and the means of disclosure.

This court reviews a circuit court's interpretation of a constitutional provision de novo. *City of Fayetteville v. Wash. Cty.*, 369 Ark. 455, 255 S.W.3d 844 (2007). We are not bound by a circuit court's decision, but in the absence of a showing that the circuit court erred in its interpretation of the law, that interpretation will be accepted on appeal. *Kimbrell v. McCleskey*, 2012 Ark. 443, 424 S.W.3d 844. Language of a constitutional provision that is plain and unambiguous must be given its obvious and common meaning. *Smith v. Wright*, 2015 Ark. 189, 461 S.W.3d 687. Neither rules of construction nor rules of interpretation may be used to defeat the clear and certain meaning of a constitutional provision. *Richardson v. Martin*, 2014 Ark. 429, 444 S.W.3d 855.

In *Griffin v. Rhoton*, 85 Ark. 89, 95, 107 S.W. 380, 382 (1907), this court established the general rules for determining whether provisions of the constitution are self-executing:

> A constitutional provision may be said to be self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self–executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law.
>
> Cooley's Const. Lim. (7th Ed.) p. 1121. The same learned author in further comment on the subject says: But, although none of the provisions of a constitution are to be looked upon as immaterial or merely advisory, there are some which, from the nature of the case, are as incapable of compulsory enforcement as are directory provisions in general. The reason is that, while the purpose may be to establish rights or to impose duties, they do not in and of themselves constitute a sufficient rule by means of which such right may be protected or such duty enforced. In such cases, before the constitutional provision can be made effectual, supplemental legislation must be had, and the provision may be in its nature mandatory to the Legislature to enact the needful legislation, though back of it there lies no authority to enforce the command.

In *Cumnock v. City of Little Rock*, 168 Ark. 777, 271 S.W.2d 466 (1925), we added that the question in every case is whether the language of the constitutional provision is addressed

to the court or to the General Assembly, meaning whether the provision was intended as a present enactment, complete in itself as definitive legislation, or whether it contemplates subsequent legislation to carry it into effect. If there is language indicating that the subject is referred to the General Assembly, the provision is not construed as self-executing. *Cumnock*, *supra*. In *Griffin*, *supra*, we held that the framers did not intend the provision under consideration to be self-executing because it contained the phrase "as shall hereafter be directed by appropriate legislation." Accordingly, we also held that a citizen and taxpayer did not have a legal right to enforce obedience to the provision.

We take this opportunity to develop our limited case law concerning article 19, section 12. This court has said that the disclosure requirement is limited to expenditures. *Snyder v. Martin*, 305 Ark. 128, 806 S.W.2d 358 (1991). We also have held that the provision authorized the General Assembly to enact the Publicity Act of 1914, which provided for the publication of laws, reports, and miscellaneous matters, including claims allowed against counties. *See Clark v. Hambleton*, 235 Ark. 467, 360 S.W.2d 486 (1962); *Jeffery v. Trevathan*, 215 Ark. 311, 220 S.W.2d 412 (1949). Thus, there is no doubt that the General Assembly has the authority to pass laws to implement this constitutional provision. The phrase "as may be prescribed by law" supports this conclusion, and under the authorities cited above, this language also indicates that the provision is not self-executing.

Article 19, section 12 states that expenditures of public money, the amounts paid, to whom an expenditure is paid, and on what account "shall" be published "from time to time" "as may be prescribed by law." It is undisputed that an expenditure of public money was made for the purchase of the drugs to be used in executions. The issue is whether the

General Assembly has the authority to direct the circumstances under which the information is to be revealed. In our view, the constitution left it to the General Assembly to determine the time and the manner for the disclosure of public expenditures. In this instance, the General Assembly discharged its obligation in a manner that is consistent with the constitution. In adopting this legislation, it did not completely shield the identity of the supplier from disclosure. Instead, the General Assembly determined that any disclosure is to be made by the ADC in litigation on the condition that it first apply for a protective order. As a matter of general principle, we have recognized that the General Assembly, unless restricted by the constitution, has the full and plenary powers to adopt such policies and prescribe the duties that it demands of officers carrying out such policies when it is deemed best for the peace and welfare of the people. *Campbell v. Ark. State Hosp.*, 228 Ark. 205, 306 S.W.2d 313 (1957). Here, the constitution granted the power to the General Assembly to determine the time and means by which article 19, section 12 is to be implemented. Consequently, the Act does not offend the constitution.

Reversed and dismissed; motion to strike moot.[7]

WYNNE, J., concurs in part; dissents in part.

DANIELSON and HART, JJ., dissent.

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[7] Under the guise of Arkansas Supreme Court Rule 5-1(j), the parties have favored us with a series of what can only be described as letter briefs. We do not condone this practice. Although the rule requires a litigant to furnish this court and opposing counsel the citation to a case that will be referred to at oral argument that was not cited in his or her brief, it does not permit parties to present argument along with the citation.

ROBIN F. WYNNE, Justice, concurring in part and dissenting in part. I believe that appellees satisfied their burden at this stage with regard to their claim that the method of execution set forth in Act 1096 of 2015 substantively violates the Arkansas Constitution's prohibition of cruel or unusual punishment. I further believe that portions of Act 1096 violate article 19, § 12 of the Arkansas Constitution. Accordingly, I concur in part and dissent in part.

The majority's conclusion that appellees failed to satisfy their burden at this stage regarding the second prong of the test announced in *Glossip v. Gross*, ___ U.S. ___, 135 S. Ct. 2726 (2015), is mistaken. The majority concludes that appellees failed to present facts sufficient create a question of fact regarding whether the risk posed by the challenged method of execution is substantial when compared to known and available alternative methods of execution. Appellees have created a triable issue as to the second prong of the *Glossip* test. They have laid out several different alternatives that they contend carry a reduced risk of severe pain when compared to the challenged method of execution. They have further produced evidence that the methods are available and that they carry a reduced risk in comparison with the method contained in Act 1096. Appellants might be mistaken in their assertions, but that issue is not before us at this stage in the proceedings. I would remand the matter to the circuit court for further proceedings on appellees' substantive challenge to the lethal-injection protocol laid out in Act 1096.

The majority's analysis of whether of the confidentiality requirements of Act 1096 violate article 19, § 12 of the Arkansas Constitution is likewise flawed. As the majority notes, we stated in *Griffin v. Rhoton*, 85 Ark. 89, 95, 107 S.W. 380, 382 (1907), that "[a]

constitutional provision may be said to be self-executing if it supplies a sufficient rule, by means of which the right given may be enjoyed and protected, or the duty imposed may be enforced; and it is not self-executing when it merely indicates principles, without laying down rules by means of which those principles may be given the force of law." Under this test, article 19, § 12 is self-executing. Far from merely indicating principles, the provision clearly states exactly what information is to be given to the public. The only role given to the General Assembly is to decide *how* to make the information public. One thing that the General Assembly may not do is decide *whether* to make the information public. This is exactly what the nondisclosure provisions of the Act do, and the majority has erroneously chosen to legitimize that overreach of authority by the General Assembly.

The majority further errs by holding that subsection (i)(3) of Act 1096, which allows the Arkansas Department of Correction to disclose the information after obtaining a protective order, brings the nondisclosure provisions within the legislature's authority to determine the time and manner of disclosure. However, article 19, § 12 expressly requires that the information be *published*. To publish something is to declare it publicly or make it generally known. *Webster's Third New International Dictionary* 1837 (2002). Essentially, the majority is saying that a requirement for certain information to be publicly declared is satisfied if a state agency first gets an order *prohibiting the information from being made public.* That makes absolutely no sense whatsoever. Portions of Act 1096 clearly violate article 19, § 12 of the Arkansas Constitution. I would hold those subsections of the Act to be unconstitutional on that basis.

For these reasons I concur in part and dissent in part.

PAUL E. DANIELSON, Justice, dissenting. I respectfully dissent. This court lacks jurisdiction to hear this appeal because there was no specific ruling on the issue of sovereign immunity. Arkansas Rule of Appellate Procedure– Civil 2(a)(10) (2015) permits an appeal from an interlocutory order denying a motion to dismiss based on the defense of sovereign immunity. *See Ark. Lottery Comm'n v. Alpha Mktg.*, 2012 Ark. 23, 386 S.W.3d 400. However, before an interlocutory appeal may be pursued from the denial of a motion to dismiss on the ground of sovereign immunity, we must have in place an order denying the motion to dismiss on that basis. *Id.*

Here, the ADC filed an interlocutory appeal from the circuit court's order dated December 3, 2015. Therefore, this court's review is limited to the December 3, 2015 order in determining whether the circuit court ruled on sovereign immunity. In that order, the circuit court makes very specific rulings on each claim, yet makes no ruling on sovereign immunity.

Contrary to the assertion of the majority, *Alpha Marketing* does apply in this case. This court has been clear that it will not presume a ruling from the circuit court's silence, as we have held that we will not review a matter on which the circuit court has not ruled, "*and a ruling should not be presumed.*" *Alpha Mktg.*, 2012 Ark. 23, at 7, 386 S.W.3d at 404 (emphasis in original). As such, this court lacks jurisdiction to hear the instant appeal. Accordingly, I would dismiss this appeal without prejudice.

JOSEPHINE LINKER HART, Justice, dissenting. I respectfully dissent. First, the majority addresses issues not preserved for appellate review. Arkansas Code Annotated section 5-4-617(i)(2)(B) (Supp. 2015) provides that the Arkansas Department of Correction

(ADC) "shall keep confidential all information that may identify or lead to the identification of . . . [t]he entities and persons who compound, test, sell, or supply the drug or drugs . . . , medical supplies, or medical equipment for the execution process." Arkansas Code Annotated section 5-4-617(i)(3) provides that the ADC "shall not disclose the information covered under this subsection in litigation without first applying to the court for a protective order regarding the information under this subsection." Thus, according to the statute, there is not an absolute bar to the disclosure of the information by the ADC in litigation. Rather, before the information is to be disclosed in litigation, the onus is on the ADC to seek a protective order.

In keeping with the statute, appellants moved for a protective order to shield them from having to disclose the information. In its order filed December 3, 2015, the circuit court denied the motion for a protective order. On appeal, appellants challenge the circuit court's rulings that certain constitutional provisions require disclosure of the information. In their brief, appellants address constitutional claims relating to the contracts clause, freedom of speech and the press, procedural due process, and publication of public expenditures.

Appellants, however, did not present as a separate point on appeal an argument challenging the circuit court's specific ruling denying their motion for a protective order. To the extent that any of the claims raised in this interlocutory appeal were based on an implied ruling on sovereign immunity, the request for a protective order was also based on a claim of sovereign immunity and thus appealable on an interlocutory basis. Furthermore, an order denying a motion for a protective order may be appealed on an

interlocutory basis. Ark. R. App. P.–Civ. 2(f)(1).[1] Because they do not challenge on appeal the circuit court's denial of the protective order, appellants have abandoned any challenge relating to the circuit court's denial. Issues raised below but not argued on appeal are considered abandoned. *See, e.g.*, *State v. Johnson*, 374 Ark. 100, 102 n.1, 286 S.W.3d 129, 131 n.1 (2008). Essentially, by not addressing the issue, appellants have conceded the correctness of the court's order denying the motion for a protective order.

Furthermore, even though the circuit court made findings that disclosure was constitutionally required, the circuit court's denial of appellants' motion for a protective order served as an alternative basis for requiring disclosure. When a circuit court bases its decision on more than one independent ground—such as here, where the circuit court ruled on appellants' constitutional claims, as well as appellants' motion for a protective order and required disclosure of the information—and an appellant fails to challenge all those grounds on appeal—such as here, where appellants addressed only the circuit court's constitutional rulings—we will affirm without addressing any of the grounds. *Evangelical Lutheran Good Samaritan Soc'y v. Kolesar*, 2014 Ark. 279, at 6. Thus, I would affirm the circuit court's decision to require the disclosure without addressing any of its rulings related to disclosure of the information. Moreover, if, as the majority implies, the issue was not appealable, then it is a question to be resolved by this court in a future appeal. Thus, under the majority's analysis, dismissal is premature.

[1]Appellees made no effort to comply with the rule.

Second, the majority holds that the circuit court erred in concluding that appellees pleaded sufficient facts as to the alternative methods of execution. In reviewing the trial court's decision on a motion to dismiss under Ark. R. Civ. P. 12(b)(6), this court treats the facts alleged in the complaint as true and views them in a light most favorable to the party who filed the complaint. *Waller v. Kelley*, 2016 Ark. 252. In testing the sufficiency of the complaint on a motion to dismiss, all reasonable inferences must be resolved in favor of the complaint, and the pleadings are to be liberally construed. *Id.* The majority does not treat the facts alleged as true or liberally construe the complaint, and it considers materials outside of the pleadings. Furthermore, the appellate posture of this case is unusual in that Rule 2(a)(10) of the Arkansas Rules of Appellate Procedure–Civil permits an appeal from an interlocutory "order denying a motion to dismiss . . . based on the defense of sovereign immunity." Rule 12(j) of the Arkansas Rules of Civil Procedure provides, "Attorneys will be notified of action taken by the court under this rule, and, if appropriate, the court will designate a certain number of days in which a party is to be given to plead further. When a dismissal pursuant to Rule 12(b)(6) is granted because the complaint is determined to be factually insufficient, then it is improper for such a dismissal to be granted with prejudice and without leave to plead further pursuant to Rule 12(j). *Ballard Grp., Inc. v. BP Lubricants USA, Inc.*, 2014 Ark. 276, at 19, 436 S.W.3d 445, 456. Because the majority dismisses for failure to plead sufficient facts, I submit that the dismissal is without prejudice, and appellees may plead further.

Third, the majority disregards a critical distinction between the state and the federal constitution. Article 2, section 9 of this state's constitution prohibits the infliction of

"cruel or unusual punishments." In contrast, the Eighth Amendment to the federal constitution prohibits the infliction of "cruel and unusual punishments." Appellees ask this court to consider the distinction between the words "and" and "or" and to reject the two-prong test that the United States Supreme Court has developed in its cases interpreting the Eighth Amendment. The majority rejects this notion, holding that "[w]e are not convinced that the slight variation in phraseology between the two constitutions denotes a substantive or conceptual difference in the two provisions that would compel us to disregard any part of the test governing a challenge to the method of execution." However, as one treatise has noted, "The conjunctions *and* and *or* are two of the elemental words in the English language. . . . [*A*]*nd* combines items while *or* creates alternatives. Competent users of the language rarely hesitate over their meaning." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012). The distinction is dismissed by the majority, and this case serves as an unfortunate precedent for future cases involving the interpretation of statutes, contracts, or the state constitution.

Leslie Rutledge, Att'y Gen., by: *Lee P. Rudofsky*, Solicitor General, and *Jennifer L. Merritt*, Ass't Att'y Gen., for appellants.

John C. Williams, Federal Public Defender Office; and *Jeff Rosenzweig*, for appellees.

Appendix B

FORMAL ORDER

STATE OF ARKANSAS,)
) SCT.
SUPREME COURT)

BE IT REMEMBERED, THAT A SESSION OF THE SUPREME COURT BEGUN AND HELD IN THE CITY OF LITTLE ROCK, ON JULY 21, 2016, AMONGST OTHERS WERE THE FOLLOWING PROCEEDINGS, TO-WIT:

SUPREME COURT CASE NO. CV-15-992

WENDY KELLEY, DIRECTOR, ARKANSAS DEPARTMENT OF CORRECTION AND ARKANSAS DEPARTMENT OF CORRECTION APPELLANTS

V. APPEAL FROM PULASKI COUNTY CIRCUIT COURT, FIFTH DIVISION – 60CV-15-2921

STACEY JOHNSON, JASON MCGEHEE, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, AND LEDELL LEE APPELLEES

APPELLEES' PETITION FOR REHEARING IS DENIED. DANIELSON, HART, AND WYNNE, JJ., WOULD GRANT. APPELLEES' MOTION TO STAY THE MANDATE IS GRANTED. BAKER, GOODSON, AND WOOD, JJ., WOULD DENY.

IN TESTIMONY, THAT THE ABOVE IS A TRUE COPY OF THE ORDER OF SAID SUPREME COURT, RENDERED IN THE CASE HEREIN STATED, I, STACEY PECTOL, CLERK OF SAID SUPREME COURT, HEREUNTO SET MY HAND AND AFFIX THE SEAL OF SAID SUPREME COURT, AT MY OFFICE IN THE CITY OF LITTLE ROCK, THIS 21ST DAY OF JULY, 2016.

Stacey Pectol
CLERK

BY: _____
DEPUTY CLERK

ORIGINAL TO CLERK

CC: JOHN C. WILLIAMS
JEFF ROSENZWEIG
DEBORAH RUTH SALLINGS
JENNIFER L. MERRITT, ASSISTANT ATTORNEY GENERAL
LEE RUDOFSKY, SOLICITOR GENERAL
HONORABLE WENDELL GRIFFEN, CIRCUIT JUDGE

Appendix C

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

STACEY JOHNSON, JASON MCGEHEE,
BRUCE WARD, TERRICK NOONER,
JACK JONES, MARCEL WILLIAMS,
KENNETH WILLIAMS, DON DAVIS and
LEDELL LEE PLAINTIFFS

v. No. 60CV-15-2921

WENDY KELLEY, in her official capacity as
Director of the Arkansas Department of
Correction, and ARKANSAS DEPARTMENT
OF CORRECTION DEFENDANTS

MEMORANDUM ORDER DENYING MOTION TO DISMISS AMENDED COMPLAINT

Plaintiffs have each been charged, tried, and convicted of capital murder, and have each been sentenced to death by lethal injection. Plaintiffs filed the instant litigation on April 6, 2015 seeking a declaratory judgment that the statutory framework pertaining to the method of execution (hereafter "MOE") enacted as Act 1096 of 2015, (codified as Arkansas Code Annotated § 5-4-617) violates several provisions of the Arkansas Constitution. Plaintiffs also seek a preliminary injunction to prohibit execution of their death sentences pursuant to the MOE prescribed by Act 1096 and the protocol disclosed to them by Defendants.

Defendants have moved to dismiss the legal challenge to Act 1096 and their MOE protocol based on the following contentions:

1. Defendants argue that the Amended Complaint fails to state a cognizable claim of a constitutional violation and, consequently, is barred by sovereign immunity pursuant to Article V, § 20 of the Arkansas Constitution.

2. Defendants argue that Act 1096 does not violate the Contracts Clause of the Arkansas Constitution (Article II, § 17) as alleged by Plaintiffs.
3. Defendants argue that Plaintiffs' facial challenge to the constitutionality of Act 1096 on freedom of speech, freedom of the press, and right of access to governmental proceedings guaranteed by Article II, § 6 of the Arkansas Constitution fails to state facts upon which relief can be granted and, as such, is barred by the doctrine of sovereign immunity.
4. Defendants contend that Plaintiffs' claim that Act 1096 violates the procedural protections implied by Article II, § 9 of the Arkansas Constitution (which prohibits cruel or unusual punishment) by preventing Plaintiffs from obtaining information that would enable them to identify the suppliers of lethal injection drugs used for carrying out death sentences fails to state facts upon which relief can be granted and, as such, is barred by the doctrine of sovereign immunity.
5. Defendants contend that Plaintiffs' allegation that Act 1096 violates their (Plaintiffs') rights to procedural and substantive due process as guaranteed by Article II, § 8 of the Arkansas Constitution fails to state facts upon which relief can be granted and, as such, must be dismissed as a matter of law.
6. Defendants contend that Plaintiffs' allegation that Act 1096 violates the separation-of-powers mandate prescribed at Article IV, §§ 1 and 2 by delegating impermissible legislative discretion to Defendants and by usurpation of the judicial function lacks merit and must be dismissed as a matter of law.
7. Defendants contend that Plaintiffs' allegation that the provision of Act 1096 regarding use of midazolam during the lethal injection protocol violates their

(Plaintiffs') right to be free from cruel or unusual punishment as guaranteed by Article II, § Section 9 of the Arkansas Constitution is facially without merit and, as such, must be dismissed as a matter of law.

The Court has reviewed the motion to dismiss and supporting brief, amended complaint and supporting affidavits, and Plaintiffs' response to the motion to dismiss. The Court also heard oral arguments on October 7, 2015 concerning the dismissal motion, and is mindful that Defendants have scheduled executions beginning on October 21, 2015 based on the MOE protocol developed pursuant to Act 1096.

A motion to dismiss challenges the legal sufficiency of pleadings, claims, or defenses. In reviewing a motion to dismiss the duty of the trial court is to determine whether the complaint alleges facts that set forth colorable claims for relief. In doing so the court does not weigh the strength of any claims or the probative force of any factual allegations asserted in the complaint.

The law has long been settled in Arkansas that in reviewing a complaint in connection with a motion to dismiss on grounds of legal insufficiency the pleadings are to be liberally construed and are sufficient if they advise a party of its obligations and allege a breach of them. To properly dismiss a complaint the trial court must find that the complaining parties either (1) failed to state general facts upon which relief could have been granted or (2) failed to include specific facts pertaining to one or more of the elements of one of its claims after accepting all facts contained in the complaint as true and in the light most favorable to the non-moving party. *Bethel Baptist Church v. Church Mut. Ins. Co.*, 54 Ark. App. 262, 924 S.W. 2d 494 (1996).

In considering a motion for a judgment on the pleadings for failure to state facts upon which relief can be granted, the facts alleged in the complaint must be treated as true and viewed in the light most favorable to the party seeking relief. *Smith v. American Greetings Corp.*, 304 Ark. 596, 804 S.W.2d 683 (1991). In considering a motion to dismiss under Rule 12(b)(6) of the Arkansas Rules of Civil Procedure the facts alleged in the complaint are treated as true and viewed in the light most favorable to the party seeking relief, and it is improper for the trial court to look beyond the complaint to decide a motion to dismiss unless it is treating the motion as one for summary judgment. *Deitsch v. Tillery*, 309 Ark. 401, 833 S.W.2d 760 (1992); *McAllister v. Forrest city St. Imp. Dist. No. 11*, 274 Ark. 372, 626 S.W.2d 194 (1981). A complaint that alleges facts to support a cause of action under more than one theory is not demurrable if a cause of action on at least one theory is stated. *Williams v. J.W. Black Lumber Co.*, 275 Ark. 144, 628 S.W.2d 13 (1982).

The Sovereign Immunity Defenses

Defendants argue that Plaintiffs' claims are barred by the doctrine of sovereign because the Amended Complaint does not state cognizable claim of a violation of the Arkansas Constitution. Article V, § 20 of the Arkansas Constitution states: "The State of Arkansas shall never be made defendant in any of her courts."

Defendants correctly argue that a complaint must allege facts, as opposed to conclusory allegations, showing that the pleader is entitled to relief. Pursuant to the standard previously mentioned for analyzing a motion to dismiss, the Court has analyzed the Amended Complaint in the following respects.

Motion to Dismiss Plaintiffs' Contract Clause Claim

Plaintiffs contend that Act 1096 violates Article II, § 17 of the Arkansas Constitution which states: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed ..." In support of that contention, the complaint alleges that Act 1096 abrogates a written partial agreement executed on June 14, 2013 intended to "streamline" earlier challenges to a prior lethal injection statute. The agreement states, in pertinent part, as follows:

...

> WHEREAS, the plaintiffs in *Johnson v. Wilson*, Pulaski Co. Circuit Court, Case No. 60CV-13-1204, have filed a civil action challenging ADC's [Arkansas Department of Correction] decision to withhold certain documents after receiving a request under the Arkansas Freedom of Information Act ("FOIA").
>
> ...
>
> NOW, THEREFORE, the parties agree as follows:
>
> ...
>
> 6. The defendants agree that, within 10 business days after ADC adopts a new lethal-injection protocol, ADC will provide a copy of the new protocol to counsel for the plaintiffs. In addition, the defendants agree that, within 10 days after they obtain possession of any drugs that ADC intends to use in a lethal-injection procedure, the defendants will notify the plaintiffs' counsel that it [sic] has obtained the drugs and will specify which drugs have been obtained and disclose the packing slips, package inserts, and box labels received from the supplier.

Defendants contend that Plaintiffs' Contract Clause claim should be denied and urge the Court to find that the June 2013 agreement has expired and that it was void from its inception because it encroached on exercise of the police power reserved to the State. Neither contention justifies dismissal.

First, the Amended Complaint alleges that the Arkansas Department of Correction agreed to disclose "the packing slips, package inserts, and box labels

received from the supplier" of lethal injection drugs. The June 2013 agreement specified that civil litigation had been filed [*Johnson v. Wilson*, Pul. Cir. No. CV 13-1204] to challenge "ADC's decision to withhold certain documents after receiving a request under the Arkansas Freedom of Information Act ("FOIA"). Paragraph 5 of the June 2013 agreement recites that "[T]he plaintiffs in *Johnson v. Wilson*, 60CV-13-1204, agree to request that the Court enter a final order of dismissal of all claims that were asserted in that case. The plaintiffs also agree to dismiss or withdraw their notice of appeal in that case."

Moreover, the Amended Complaint alleges at Paragraph 16 that "Plaintiffs Marcel Williams, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Stacey Johnson, Kenneth Williams, and Don Davis are all parties to the settlement agreement/contract consummated on June 14, 2013." Paragraph 18 of the Amended Complaint alleges that Ray Hobbs, then ADC Director, was also a party to the June 2013 agreement. Paragraph 19 of the Amended Complaint alleges that Defendant ADC "was a party to the settlement agreement/contract consummated on June 14, 2013."

The Amended Complaint alleges at Paragraph 44 that Act 1096 contains a provision (§ 2(i)2) which states:

> The department shall keep confidential all information that may identify or lead to the identification of: ...(B) The entities and parties who compound, test, sell, or supply the drug or drugs described in subsection (c) of this section [which pertains to the lethal-injection drugs authorized for execution of capital punishment], medical supplies, or medical equipment for the execution process.

At Paragraph 45, the Amended Complaint alleges that "ADC has interpreted this provision to allow it to keep secret not only the direct suppliers of the drugs but also the ultimate manufacturers of the drugs."

The Amended Complaint alleges at Paragraph 42 that "about 12 to 18 months after the parties entered into a contract requiring the ADC to disclose the names and addresses of producers/suppliers of their drugs, the ADC and its attorneys at the Arkansas Attorney General's Office began drafting and lobbying for passage of legislation that would abrogate the contract." As previously mentioned, Paragraphs 44 and 45 of the Amended Complaint allege that Act 1096 is the legislation which ADC contends allows it to refuse to disclose the identities of the lethal-injection drugs suppliers/manufacturers.

The law has been settled in Arkansas for decades that "whatever enactment abrogates or lessens the means of the enforcement of a contract impairs its obligations." *Scougale v. Page*, 194 Ark. 280, 106 S.W.2d 1023 (1937) Plaintiffs have alleged specific facts regarding a June 14, 2013 agreement with Defendants pertaining to disclosure of the information sought by the instant lawsuit. Plaintiffs have identified specific provisions of Act 1096 which they contend "abrogates or lessens the means of enforcement" of the June 14, 2013 agreement. Those allegations are quite sufficient to state a claim for violation of Article II, § 17 of the Arkansas Constitution and withstand Defendants' sovereign immunity dismissal motion as to that claim.

Defendants insist that Act 1096 does not substantially impair any rights Plaintiffs claim under the 2013 agreement and maintain that Act 1096 is constitutional "because it is reasonable and necessary to serve an important public purpose" (October 5, 2015 Motion to Dismiss Amended Complaint, p. 2). However, Act 1096 directs the ADC to maintain as confidential all information that may identify or lead to the identification of the entities and persons who compound, test, sell, or supply the drug or drugs used in

the lethal-injection protocol. Act 1096 also directs the ADC to not disclose that information in litigation without first applying to the court for a protective order regarding disclosure. Act 1096 directs the ADC to only disclose package inserts and labels for lethal-injection drugs approved by the federal Food and Drug Administration (FDA), reports from independent test laboratories, and the ADC procedure for administering the lethal-injection drugs (including the contents of the lethal-injection drug box) only if information that might identify the compounding pharmacy, testing laboratory, seller, or supplier of the lethal-injection drugs is redacted and maintained as confidential.

The Amended Complaint plainly alleges, as fact, that the information now shielded from disclosure by Act 1096 was contemplated by the June 14, 2013 agreement that settled Plaintiffs' lawsuit against Defendants. Plaintiffs alleged in their original complaint filed in the instant lawsuit that "[h]istorically, information about supplies and suppliers used for executions has been available to the public and the press." *See*, Plaintiffs' June 29, 2015 Complaint, paragraph 77, p. 24. The Amended Complaint alleges that when counsel for Defendants notified counsel for Plaintiffs on July 10, 2015 that the ADC had purchased midazolam, vercuronium bromide, and potassium chloride for lethal injections that notification did not disclose the "package slips" that would have identified the proximate supplier of those drugs as would have been required by Paragraph 6 of the settlement agreement and that Defendants have not disclosed any "package slips," "box labels received from the supplier (which would have identified the manufacturer, compounder, or proximate supplier of the drugs), and that counsel for Defendants produced redacted package inserts for the lethal injection drugs with information that would have identified the manufacturers or compounders of

those drugs. (Amended Complaint, paragraph 68). Those allegations are sufficient to state a claim for breach of Paragraph 6 in Plaintiffs' June 14, 2013 settlement agreement with Defendants. The fact that Act 1096 contains an emergency clause and was enacted with legislative findings that it is necessary does not render Plaintiffs' Contract Clause claim legally insufficient. The comment stated by Justice Samuel Alito, writing for the majority in the recent U.S. Supreme Court decision of *Glossip v. Gross*, No. 14-7955, 2015 WL 2473454 (June 29, 2015) that "anti-death-penalty advocates pressured pharmaceutical companies to supply the drugs used to carry out death sentences" also does not affect the legal sufficiency of the facts alleged by Plaintiffs. Defendants have obviously been able to obtain lethal-injection drugs for execution of death sentences and plainly do not want to identify the supplier(s) of those drugs.

Whether identifying the supplier(s) will hinder Defendants' ability to perform capital executions is a matter to be established by proof, not resolved by a motion to dismiss at the earliest stage of litigation. Plaintiffs correctly observe that the disagreement over whether disclosure will hinder Defendants' ability to carry out executions by lethal injection so as to make the non-disclosure requirement in Act 1096 reasonable and necessary is a matter that demands discovery and trial. The issue now before the Court is not whether Plaintiffs are entitled to judgment, but whether they have alleged facts sufficient to state a claim for relief on their claim that Act 1096 violates Article II, § 17 of the Arkansas Constitution. They have quite clearly done so. Accordingly, Defendants' motion to dismiss Plaintiffs' Article II, § 17 claim is DENIED.

Motion to Dismiss Plaintiffs' Article II, § 6 Claim

Plaintiffs' claim that Act 1096 violates their rights to freedom of speech and the press and their right of access to governmental proceedings guaranteed by Article II, § 6 of the Arkansas Constitution. Defendants acknowledge that the state constitution "guarantees a qualified right of access to governmental proceedings that (1) have historically been open to the press and general public, and when (2) public access plays a significant factor in the functioning of the process at issue and the government as a whole, citing *Ark. Television Co. v. Tedder*, 281 Ark. 152, 154, 662 S.W.2d 174, 175 (1983) (Defendant's Brief in support of Motion to Dismiss, p. 25). However, Defendants rely on the decision of the United States Supreme Court in *Houchins v. KQED, Inc.*, 438 U.S.1 (1978) and decisions of the Court of Appeals for the Eighth Circuit in *Rice v. Kempker*, 374 F.3d 675 (8th Cir. 2004) and the recent decision in *Zink v. Lombardi*, 783 F.3d 1089 (8th Cir. 2015) in asserting that, as a matter of law, Plaintiffs "have no constitutional right to information or documents that may identify entities and persons who compound, test, sell, or supply drugs for the execution process." (Defendants' Brief in support of Motion to Dismiss, p. 28).

Defendants contend that Plaintiffs fail to state facts "demonstrating a qualified right of public access to information regarding the source of drugs to be used in their executions" and that "even if Arkansas at one time 'voluntarily disclosed such information, it does not a tradition make' sufficient to ... conclude that public access to information about lethal drug suppliers would enhance the functioning of the death penalty in Arkansas." (Defendants' Brief, p. 29). Thus, Defendants assert that Article II, § 6 of the Arkansas Constitution guarantees only that Plaintiffs "are entitled to

information about the method of execution as well as the identification of the drug or drugs to be used in the lethal-injection procedure and, in the case of FDA-approved drugs, the redacted package inserts and labels." (Defendants' Brief, p. 30).

However, Defendants' arguments do not establish that Plaintiffs' Article II, § 9 claim is legally insufficient. Plaintiffs allege that information about the identity of the suppliers of lethal injection drugs was available to the public and media before Act 1096 was enacted, that counsel for Plaintiffs requested that information, and that the ADC disclosed it (*See*, June 29, 2015 Complaint, Paragraphs 24, 25, 26, and 27). Those allegations contradict Defendants' contention that Plaintiffs fail to state facts demonstrating a history of disclosure or a qualified right of access to disclosure about the source of lethal injection drugs.

Whether Defendants will be able to obtain lethal injection drugs if required to identify the supplier(s) of those drugs is a question of fact, not a matter of law. The cases Defendants cite in support of their motion to dismiss Plaintiffs' Article II, § 6 claim were resolved after trial on the merits, not at the pleading stage. The Court holds that Plaintiffs have alleged facts sufficient to state a claim for violation of Article II, § 6 of the Arkansas Constitution. Defendants' motion to dismiss their claim is DENIED.

Motion to Dismiss Plaintiff's Procedural and Substantive Due Process Claims

Plaintiffs allege that Act 1096 violates procedural protections implicit in Article II, § 8 of the Arkansas Constitution, the state equivalent to the Eighth Amendment to the U.S. Constitution that prohibits "cruel and unusual punishment," by denying them access to information needed to identify the suppliers of lethal injection drugs and thus discover the facts required to prove a violation of Article II, § 8, (*See* Amended

Complaint, Paragraphs 118 and 119). Plaintiffs also allege that Act 1096 violates their rights to substantive due process by contending that "the lethal injection procedure that the ADC will purposely or knowingly employ ... entails objectively unreasonable risks of substantial and unnecessary pain and suffering, unbearable anxiety, and/or a lingering death." (*See* Amended Complaint, Paragraph 125).

Defendants challenge the legal sufficiency of the procedural due process claim as a matter of law by arguing (a) that it fails to allege an actual injury caused by lack of access to information about the suppliers of lethal injection drugs and (b) that the procedural due process claim fails to allege facts showing that Plaintiffs have been deprived any interest protected by the Due Process Clause. Defendants challenge the legal sufficiency of the substantive due process claim as a matter of law and contend that (a) it fails to allege facts concerning a "known and available alternative method of execution that entails a lesser risk of pain," (b) that Plaintiffs fail to allege facts showing that the lethal injection protocol prescribed by Act 1096 "entails a substantial risk of severe pain," and (c) that Article II, § 9 of the Arkansas Constitution (the Arkansas counterpart to the Eighth Amendment to the U.S. Constitution) is the proper standard by which Act 1096 must be judged, not Article II, § 8 (the due process clause).

Plaintiffs' procedural due process challenge to Act 1096, in effect, amounts to an assertion that the right to challenge the method of execution prescribed by Act 1096 is meaningless without the ability to discover facts that prove the method of execution, including non-disclosure of the identity of lethal injection drug suppliers, will subject them to the substantial risk of suffering tortured and inhumane deaths. It is beyond argument that persons sentenced to death have a right to be free from torture and

inhumane treatment during execution of their death sentences. *In re Lombardi*, 741 F.3d 888, (8th Cir. 2014), *Baze v. Rees*, 553 U.S. 35, 128 S.Ct. 1520 (2008), *Nooner v. Norris*, 594 F.3d 592 (8th Cir. 2010). Moreover, courts have long recognized that fundamental fairness demands that persons threatened with deprivation of recognized liberty interests are entitled to a meaningful proceeding in which to adjudicate their claims. *Bill's Printing, Inc. v. Carder*, 357 Ark. 242, 252, 161 S.W.3d 803, 809 (2004), *Watkins v. State*, 2010 Ark. 156, ¶ 5, 362 S.W.3d 910, 915 (2010). The constitutional requirement of procedural due process exists to guarantee that fundamental rights are adjudicated in a fair manner, not by a perfunctory exercise.

Plaintiffs contend Act 1096 deprives them of the fundamental right to discover crucial facts needed to prove their allegation that the method of execution protocol prescribed by the statute is cruel or unusual in violation of Article II, § 9 of the Arkansas Constitution. Defendants are mistaken in contending that, as a matter of law, Plaintiffs have no right to discover information needed to prove civil claims that assert constitutional violations. The notion that Plaintiffs' Article II, § 9 cruel-or-unusual punishment claims can be meaningfully adjudicated without providing Plaintiffs access to discovery of facts needed to prove their claims flies in the face of sound trial advocacy, not to mention common sense.

By alleging that Act 1096 prevents disclosure of the identity of the supplier(s) of lethal injection drugs that will be used in their executions, and thereby prevents them from obtaining the proof that their executions carry the substantial risk of being unnecessarily painful, if not tortured, Plaintiffs have pled facts sufficient to state a claim

that Act 1096 violates Article II, § 8 of the Arkansas Constitution. Defendants' motion to dismiss Plaintiffs' Article II, § 8 claims are DENIED.

Similarly, Defendants' dismissal motion as to Plaintiffs' substantive due process claim that the method of execution protocol prescribed by Act 1096 violates Article II, § 8 is DENIED. The law does not prevent Plaintiffs from alleging alternative causes of action. They are only required, at this stage of the litigation, to allege sufficient facts to establish claims for relief. By alleging that the method of execution protocol and non-disclosure provision of Act 1096 pose a substantial risk that they will suffer unnecessarily painful deaths, if not torturous deaths, Plaintiffs have satisfied their pleading burden.

Motion to Dismiss Plaintiffs' Separation-of-Powers Claim

Defendants also urge the Court to dismiss, with prejudice, Plaintiffs' claim that Act 1096 violates Article IV of the Arkansas Constitution by excessively delegating legislative discretion to the ADC and by impairing the judicial function. Article IV provides, in pertinent part, as follows:

> The powers of the government of the State of Arkansas shall be divided into three distinct departments, each of them to be confided to a separate body of magistracy, to-wit: Those which are legislative, to one, those which are executive, to another, and those which are judicial, to another.
>
> No person or collection of persons, being of one of these departments, shall exercise any power belonging to either of the others, except in the instances hereinafter expressly directed or permitted.

Plaintiffs allege that Act 1096 violates Article IV. First, Plaintiffs claim that Act 1096 excessively delegates to the ADC "leeway to choose between, on one end, a barbiturate-only execution procedure and, on the other end, a completely different execution procedure that omits barbiturate drugs entirely" [and authorizes administration

of midazolam, a drug Plaintiffs claim will not render them unconscious or insensate to pain when the second and third drugs are administered]. (*See* Amended Complaint, Paragraph 130(a)(iii)). Plaintiffs also allege that Act 1096 "provides the ADC with unfettered discretion" by (a) allowing the ADC to choose a barbiturate-only procedure, (b) by allowing the ADC to "choose between pure, FDA-approved manufactured drugs and compounded drugs that are likely to cause serious pain and suffering," (c) by granting the ADC discretion "to select the members of the execution team without any reasonable guidelines and appropriate standards to provide guidance about who should be chosen," and (d) by giving the ADC "unfettered discretion about whether and how members of the execution team should be trained." Plaintiffs also allege that Act 1096 intrudes into the judicial function by imposing a secrecy requirement about the identity of the suppliers of lethal injection drugs related to Plaintiffs' claim that the lethal injection protocol and drugs prescribed by the Act violate their right to be free from cruel or unusual punishment.

The Court holds that Defendants' challenges to the legislative aspects of the separation-of-powers claims asserted in the Amended Complaint are controlled by the holding in *Hobbs v, McGehee*, 2015 Ark. 116. In that decision, the Arkansas Supreme Court reversed this Court's decision that Act 139 of 2013 violated the separation-of-powers doctrine found at Article IV of the Arkansas Constitution because it permitted the ADC to select any chemical within a class of chemicals known as barbiturates to execute a sentence of death by lethal injection. The Supreme Court held that Act 139 was constitutional because it provided guidance concerning "(1) the method the ADC must use, intravenous injection; (2) the type or class of drug the ADC must use, a

barbiturate; and (3) the amount of the drug the ADC must use, an amount sufficient to cause death" in addition to other guidance. The Supreme Court reversed this Court's holding that Act 139 violated the separation-of-powers doctrine because it did not specify the training and qualifications of the personnel involved with the lethal-injection procedure.

The holding in *Hobbs v. McGehee, supra,* is controlling on the separation-of-powers allegation Plaintiffs now assert concerning Act 1096 as to legislative delegation of authority to the ADC concerning the lethal injection protocol. Therefore, Defendants' motion to dismiss that aspect of Plaintiffs' separation-of-powers claim is GRANTED.

Defendants also argue that Act 1096 "does not delegate any judicial functions to ADC, nor does the Act make any information absolutely confidential and shielded from disclosure in judicial proceedings" (Defendants' Brief in Support of Motion to Dismiss, p. 38). However, Plaintiffs' separation-of-powers claim is legally sufficient to the extent that it is based on allegations that Act 1096 intrudes into the judicial function by imposing a secrecy requirement about the identity of the suppliers of lethal injection drugs related to Plaintiffs' claim that the lethal injection protocol and drugs prescribed by the Act violate their right to be free from cruel or unusual punishment.

Whether, and to what extent, information may be relevant to a claim that challenged governmental conduct constitutes a constitutional violation are judicial questions because the responsibility for receiving and adjudicating claims of constitutional violations belongs to courts rather than legislative bodies. Plaintiffs' allegation that Act 1096 requires the ADC to seek a protective order before disclosing information that identifies the manufacturers, suppliers, testing laboratories, and test

results related to the drugs used during lethal injections is sufficient to overcome Defendants' facial challenges to Plaintiffs' separation-of-powers claims. Accordingly, Defendants' motion to dismiss the judicial intrusion aspect of Plaintiffs' separation-of-powers claims is DENIED.

Motion to Dismiss Plaintiffs' Article II, § 9 Claim

Lastly, Defendants contend that Plaintiffs' claim that Act 1096 and the ADC lethal injection procedure it authorizes violate the ban on cruel or unusual punishments stated at Article II, § 9 of the Arkansas Constitution is without merit. At Paragraph 132, the Amended Complaint alleges that the Act's provision allowing ADC to use compounded drugs exposes Plaintiffs "to an objectively intolerable risk of serious harm due to the high likelihood that such drugs will be counterfeited, adulterated, contaminated, super-potent, or sub-potent, contain incompletely dissolved components, and/or have an unbalanced pH." *See*, Amended Complaint, Paragraph 132(a). Plaintiffs also allege that "the ADC's three-drug Lethal Injection Procedure will cause extreme pain and suffering," asserting that "[m]idazolam cannot, at any dosage, render a person unconscious and insensate to pain and suffering," and that "the second and third drugs in the listed protocol [vecuronium bromide and potassium chloride, respectively] indisputably cause extreme pain and suffering." *See*, Amended Complaint, Paragraph 132(b). Plaintiffs further allege that the provision in Act 1096 allowing the ADC to use electrocution if lethal injection is held constitutionally impermissible, exposes them to "an objectively intolerable risk of serious harm." Each of these allegations, standing alone, is sufficient to state a claim that Act 1096 violates the ban against cruel or unusual punishments. It remains to be seen whether Plaintiffs can marshal sufficient

evidence to prevail on any of them. However, that is not the issue at this stage of the litigation. Accordingly, Defendants' motion to dismiss Plaintiffs' Article II, § 9 claims must be DENIED.

Conclusion

The Court hereby holds that the Amended Complaint is legally sufficient to assert Plaintiffs' claims that the non-disclosure provision in Act 1096 violates Article II, § 17 of the Arkansas Constitution which prohibits legislation that impairs contractual obligations, specifically the June 14, 2013 agreement between counsel for Plaintiffs and Defendants. Defendants' motion to dismiss Plaintiffs' Article II, § 17 claim is DENIED.

Furthermore, the Court holds that Plaintiffs have made sufficient factual allegations to make out claims that Act 1096 violates Article II, § 6 to the extent that Plaintiffs allege that Act 1096 prohibits identification of the persons or entities who manufacture, compound, test, sell, or supply the lethal injection drugs to be administered for their executions. Defendants' motion to dismiss Plaintiffs' Article II, § 6 claim is DENIED.

The Court also holds that Plaintiffs have made sufficient factual allegations to set forth claims that Act 1096 violates their rights to procedural due process by withholding information that identifies the suppliers of lethal injection drugs in violation of Article II, § 8 of the Arkansas Constitution. Defendants' motion to dismiss Plaintiffs' procedural due process claim is DENIED.

The Court holds that by alleging that the lethal injection procedure Defendants will follow pursuant to Act 1096 will entail objectively unreasonable risks of substantial and unnecessary pain and suffering, unbearable anxiety, and/or lingering death,

Plaintiffs have sufficiently pled facts to establish their claim that Act 1096 violates their rights to substantive due process protected by Article II, § 8 of the Arkansas Constitution, and their rights to not be subjected to cruel or unusual punishment pursuant to Article II, § 9 of the Arkansas Constitution. Defendants' motions to dismiss Plaintiffs' substantive due process and cruel-or-unusual punishment claims are DENIED.

Defendants have pled sufficient factual allegations to assert their claims that Act 1096 violates the separation-of-powers doctrine enshrined at Article IV of the Arkansas Constitution insofar as Plaintiffs allege that Act 1096 encroaches on the judicial function. In that respect, Defendants' motion to dismiss Plaintiffs' separation-of-powers claims is DENIED.

However, Plaintiffs' claim that Act 1096 violates the separation-of-powers doctrine by legislatively delegating authority to the ADC to select the lethal injection drugs and establish the selection criteria and training requirements for members of the execution team is controlled by the holding in *Hobbs v. McGehee, supra*, decided earlier this year by the Arkansas Supreme Court. Defendants' motion to dismiss the legislative delegation of authority aspect of Plaintiffs' separation-of-powers challenge to Act 1096 is GRANTED.

ORDERED this 9th day of October, 2015.

CIRCUIT JUDGE

Appendix D

IN THE CIRCUIT COURT OF PULASKI COUNTY, ARKANSAS
FIFTH DIVISION

STACEY JOHNSON, JASON MCGEHEE, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS and LEDELL LEE — PLAINTIFFS

v. No. 60CV-15-2921

WENDY KELLEY, in her official capacity as Director of the Arkansas Department of Correction, and ARKANSAS DEPARTMENT OF CORRECTION — DEFENDANTS

MEMORANDUM ORDER CONCERNING PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT, DEFENDANTS' CROSS MOTION FOR SUMMARY JUDGMENT, AND DEFENDANTS' MOTION FOR PROTECTIVE ORDER

Introduction

In this lawsuit Plaintiffs contend that Act 1096 of 2015 and the method of execution (hereafter "MOE") protocol it prescribes violate the Arkansas Constitution in several respects. Both parties have filed motions for summary judgment pursuant to Rule 56 of the Arkansas Rules of Civil Procedure. Plaintiffs moved for partial summary judgment on September 30, 2015. On October 16, 2015, Defendants filed their reply to that motion, and moved for summary judgment in their favor as to all claims asserted by Plaintiffs.

On November 2, 2015, Plaintiffs filed their reply to Defendants' response to Plaintiffs' summary judgment and, pleading separately, moved to extend time to respond to Defendants' summary judgment motion concerning two claims: (1) Plaintiffs' claim that Act 1096 violates Article II, § 8 of the Arkansas Constitution, and (2) that the three-drug MOE protocol involving injection of midazolam violates the guarantee against

cruel or unusual punishment. The Court denied that motion on November 17, 2015. Later that day, Plaintiffs issued notice that they would stand on their November 9, 2015 response in opposition to Defendants' summary judgment motion. On November 25, 2015, Defendants filed their reply to Plaintiffs' response to Defendants' summary judgment motion, and their response to Plaintiffs' motion for summary judgment on two claims: (1) that Act 1096 violates Article II, § 6 of Arkansas Constitution, and (2) that Act 1096 violates Article II, § 9 of the Arkansas Constitution. The Court has received and studied the cross motions for summary judgment, supporting briefs, and accompanying exhibits submitted by the parties.

Defendants have also moved for a protective order to shield disclosure of the information the Court ordered that they disclose in its scheduling ordered dated October 12, 2015. The Court has reviewed that motion and its supporting brief, the response and supporting brief filed by Plaintiffs, and the reply filed by Defendants. The Court also heard arguments on Defendants' motion for protective order, but delayed ruling on that motion at the urging of both sides until all summary judgment motions have been decided.

For the reasons set forth below, Plaintiffs' motion for partial summary judgment is granted in part, and denied in part. Defendants' motion for summary judgment is granted in part, and denied in part. Defendants' motion for protective order is denied. Defendants are ordered to produce the material and make the disclosures mentioned in the Court's October 12 scheduling order no later than noon on Friday, December 4, 2015.

Plaintiffs' Motion for Partial Summary Judgment

Plaintiffs' Article II, § 17 Claim

In their motion for partial summary judgment, Plaintiffs first urge the Court to grant summary judgment in their favor on their allegation that Act 1096 of 2015 violates Article II, § 17 of the Arkansas Constitution (Claim 1). Article II, § 17 of the Arkansas Constitution states: "No bill of attainder, ex post facto law, or law impairing the obligation of contracts shall ever be passed ... ."

The Court finds that there are no disputed facts on Plaintiffs' Contracts Clause allegation (Claim 1). Specifically, the parties do not dispute that a written partial agreement was executed on June 14, 2013 which states, in pertinent part, as follows:

...

> WHEREAS, the plaintiffs in *Johnson v. Wilson,* Pulaski Co. Circuit Court, Case No. 60CV-13-1204, have filed a civil action challenging ADC's [Arkansas Department of Correction] decision to withhold certain documents after receiving a request under the Arkansas Freedom of Information Act ("FOIA").
>
> ...
>
> NOW, THEREFORE, the parties agree as follows:
>
> ...
>
> 6. The defendants agree that, within 10 business days after ADC adopts a new lethal-injection protocol, ADC will provide a copy of the new protocol to counsel for the plaintiffs. In addition, the defendants agree that, within 10 days after they obtain possession of any drugs that ADC intends to use in a lethal-injection procedure, the defendants will notify the plaintiffs' counsel that it [sic] has obtained the drugs and will specify which drugs have been obtained and disclose the packing slips, package inserts, and box labels received from the supplier.

Furthermore, there is no dispute that Plaintiffs Marcel Williams, Jason McGehee, Bruce Ward, Terrick Nooner, Jack Jones, Stacey Johnson, Kenneth Williams, and Don Davis are parties to the settlement agreement/contract executed by the parties, that Ray

Hobbs (then ADC Director) was a party to the June 2013 agreement, and that Defendant ADC was a party to it.

There is also no dispute that Act 1096 of 2015 was enacted several months after the June 2013 agreement, and that § 2(i)(2) of the Act states:

> The department shall keep confidential all information that may identify or lead to the identification of: ...(B) The entities and parties who compound, test, sell, or supply the drug or drugs described in subsection (c) of this section [pertaining to the lethal-injection drugs authorized for execution of capital punishment], medical supplies, or medical equipment for the execution process.

Defendants now argue that they have no obligation to disclose the information they agreed to disclose in the June 2013 partial settlement agreement with Plaintiffs. Thus, the Court finds that there are no disputed facts regarding Claim 1 (Plaintiffs' Contracts Clause Claim).

Rule 56(c)2 of the Arkansas Rules of Civil Procedure mandates that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, shows that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law on the issues specifically set forth in the motion. A partial summary judgment, interlocutory in character, may be rendered on any issue in the case, including liability."

The law has been settled in Arkansas for decades that "whatever enactment abrogates or lessens the means of the enforcement of a contract impairs its obligations." *Scougale v. Page*, 194 Ark. 280, 106 S.W.2d 1023 (1937). Although Defendants insist that Act 1096 does not substantially impair any rights Plaintiffs claim under the 2013 agreement, and argue that Act 1096 is reasonable and necessary to

serve an important public purpose; that argument begs the question. Act 1096 explicitly directs the ADC to maintain, as confidential, all information that may identify or lead to identification of the entities and persons who compound, test, sell, or supply the drug or drugs used in the lethal-injection protocol. Act 1096 directs the ADC to not disclose that information in litigation without first applying for a protective order regarding disclosure, a mandate that is clearly at odds with what the ADC agreed to do in the June 2013 settlement. Act 1096 directs the ADC to only disclose package inserts and labels for lethal-injection drugs approved by the Food and Drug Administration (FDA), reports from independent test laboratories, and the ADC procedure for administering the lethal-injection drugs (including the contents of the lethal-injection drug box) only if information that might identify the compounding pharmacy, testing laboratory, seller, or supplier of the lethal-injection drugs is redacted and maintained as confidential.

In *United States Trust Co. v. New Jersey*, 431 U.S. 1 (1977), the Supreme Court of the United States held that state laws which impair the state's contractual obligations are constitutional only, without deferring to the legislature's judgment, if a court determines that impairing the contract "is reasonable and necessary to serve an important public purpose." As a matter of constitutional law, judicial review of governmental interference with contractual obligations involves "heightened scrutiny." *United States v. Winstar Corp.*, 518 U.S. 839, 876 (1996). Under this standard, Defendants must justify governmental interference with contractual obligations by showing that the interference serves "an important public purpose," is "necessary" to effect that purpose, and that the interference is "reasonable." *See*, *United States Trust Co. v. New Jersey*, supra, at 25-26.

Defendants argue that "there is no current contract between the ADC and the Plaintiffs in this case" and that, even if there was such a contract, "Act 1096 trumps any contractual disclosure rights as a matter of law because it was a valid exercise of the General Assembly's police power." (Defendants' November 25, 2015 Reply to Plaintiffs' Response to Defendants' Cross-Motion for Summary Judgment and Response to Plaintiffs' Cross-Motion for Summary Judgment on Claims 2 and 3, page 3). The "no current contract" argument is not plausible or persuasive. Plaintiffs have not abandoned the June 2013 disclosure agreement. Plaintiffs have not released Defendants from the disclosure obligation Defendants agreed to perform in the June 2013 agreement.

Defendants argue that the non-disclosure provision of § 2(i)(2) of Act 1096 is necessary in order for the ADC to fulfill its duty to carry out capital punishment by lethal injection, and that Defendants were only able to procure the existing supply of lethal-injection drugs after Act 1096 was enacted and a supplier was confident that its identity would be shielded from discovery. Act 1096 mandates that the ADC withhold disclosure of that information. However, the legislation does not, and cannot, guarantee that a trial court will issue a protective order shielding this information from disclosure.

Defendants rely heavily on the affidavit of ADC Director Wendy Kelley. Director Kelley asserts in that affidavit that her efforts to obtain a barbiturate for the ADC's use in its lethal-injection protocol "were unsuccessful," that "[p]otential suppliers of lethal drugs declined to supply them to the ADC and explained that they were concerned that they would suffer adverse publicity and lose business if they were identified as suppliers," that the "supplier who sold to the ADC the FDA-approved drugs currently in the Department's possession for use in executions only agreed to sell those drugs to the

ADC for use in executions after receiving a copy of Act 1096 of 2015 and confirming that the ADC is required by law to keep its identity confidential unless ordered to disclose the information in litigation," and that "[t]he supplier of ADC's current supply of execution drugs has made clear ... that it will not supply any additional drugs for the ADC to use in executions." (See, Kelley affidavit at Exhibit 1 to Defendants' Motion for Summary Judgment). Defendants contend that Director Kelley's affidavit establishes the necessity for the non-disclosure provision of Act 1096. In other words, Defendants argue that without concealing the information they agreed to disclose in the June 2013 agreement, Arkansas will not be able to carry out capital punishment. There are several obvious reasons why that argument is flawed.

The first reason is historical. Defendants agreed in June 2013 to disclose the information, now legislatively-mandated as non-disclosable, without a court order. Defendants procured lethal-injection drugs before Act 1096 was enacted. Public sentiment about capital punishment does not justify breaking a governmental obligation to disclose the information called for in the June 2013 agreement.

However, when counsel for Defendants urged the Court to issue a protective order, she asserted that the supplier of the lethal-injection drugs now possessed by the ADC, covertly sold them to the ADC despite a directive from the manufacturer(s) of the drugs that the drugs would not be used for capital punishment. That admission, whether inadvertent or not, is not only telling. It appears nowhere in Director Kelley's affidavit.

Obviously, the government cannot force a drug manufacturer or supplier to produce and supply lethal-injection drugs. However, it is historically inaccurate, to put it

charitably, for Defendants to profess that they are unable to obtain lethal-injection drugs because Plaintiffs insist on holding them to their agreement to disclose the source of the lethal-injections drugs. Drug manufacturers are free to not provide pharmaceutical products for capital punishment. People opposed to capital punishment are free to object to it, and are free to withhold patronage from drug manufacturers who provide pharmaceutical drugs for capital punishment.

In the June 2013 agreement, the ADC agreed to "disclose the packing slips, package inserts, and box labels received from the supplier" of any drugs that ADC intends to use in a lethal-injection procedure within 10 days after obtaining possession of the drugs. The Court holds that § 2(i)2 of Act 1096 statutorily mandates that the ADC violate that agreement. As such, § 2(i)(2) of Act 1096 violates the prohibition on legislation that abrogates or impairs the obligation of contracts found at Article II, § 17 of the Arkansas Constitution.

The Court grants partial summary judgment in favor of Plaintiffs, accordingly. Because § 2(i)(2) of Act 1096 violates Article II, § 17 of the Arkansas Constitution, that provision of the statute is hereby declared void, effective immediately.

Plaintiffs' Article II, § 6 Claim

Defendants move for summary judgment, and argue, as a matter of law, that Plaintiffs have no constitutional right to access documents that may identify execution drug suppliers under Article II, § 6 of the Arkansas Constitution. However, Defendants concede that Article II, § 6 "guarantees a qualified right of access to governmental proceedings that (1) have historically been open to the press and public, and when (2) public access plays a significant factor in the functioning of the process at issue and the

government as a whole, citing *Ark. Television Co. v. Tedder*, 281 Ark. 152, 154, 662 S.W.2d 174, 175 (1983). Defendants admit that they possess documents that would identify execution drug suppliers. However, Defendants contend that, as a matter of law, Plaintiffs have no constitutional right to access those documents.

The Court finds that there are no issues of material fact concerning Plaintiffs' allegation that § 2(i)(2)--the non-disclosure provision--of Act 1096 of 2015 violates Article II, § 6 of the Arkansas Constitution. Section 2(i)(2) of Act 1096 bans disclosure of information that would identify lethal injection drug suppliers. The June 2013 agreement between the parties shows that Plaintiffs have sought that information for years. Exhibit 3 to the Amended Complaint shows that on April 12, 2013, following a Freedom of Information Act (FOIA) request, Shea Wilson of the Arkansas Department of Correction sent an email message to counsel for Plaintiffs which included an attachment disclosing a packing slip for lethal injection drugs. This packing slip provided information including the name and address of the supplier, West-Ward Pharmaceutical Corp., a description of the drugs provided, batch numbers, quantity, the dates provided, and to whom it was provided.

Act 1096 of 2015 was enacted in the face of that history, and in the face of the parties' June 2013 agreement whereby Defendants promised to disclose packing slips and other information that would identify the supplier of lethal-injection drugs within 10 days after obtaining possession of those drugs. Defendants have produced nothing that contradicts that factual precedent. Defendants assert that these facts show that Plaintiffs are not entitled to judgment in their favor. To the contrary, these are pertinent, and undisputed, facts.

These facts show that the information sought was public record, and was available to any citizen of the State of Arkansas who asked for them by FOIA request before Act 1096 of 2015 was enacted. The Arkansas FOIA statute was enacted in 1967. Lethal injection has been Arkansas' chosen method of execution for those sentenced to death after July 4, 1983. This means that since the inception of the lethal injection method of execution, any citizen of the State of Arkansas could have, and may have, requested the names of suppliers and manufacturers of the lethal injection drugs the State planned to use in executions, and, if or when they did, they would be entitled to receive this information as a matter of law.

The fact that the State previously provided this information on request, and entered into an agreement with Plaintiffs to provide this information, does not support the conclusion that disclosure will inhibit or hinder the State's ability to carry out lethal injections, or in any way harm the State and the citizens of Arkansas by making the lethal injection process more difficult. Instead, those facts clearly show that before Act 1096 was enacted, there was a precedent for doing so, "a tradition of accessibility." *Press-Enterprise Co. v. Superior Court,* 478, U.S. 1 (1986).

Defendants mistakenly rely on *Zinc v. Lombardi,* 783 F.3d 1089 (2015). In *Lombardi,* the prisoners alleged that Missouri did not include the suppliers of drugs for lethal injections as members of the confidential execution team, nor make their identities confidential, by statute or regulation, until October 2013. The *Lombardi* court notes, "the prisoners do not even allege that the information was accessible to the public before October 2013." *Lombardi* is distinguishable. Unlike the prisoners in *Lombardi,* Plaintiffs' argument is not that the information sought was only made confidential with the

enactment of Act 1096. Plaintiffs' argument is that the information sought was publicly accessible for as long as Arkansas has carried out lethal injections, for decades.

Second, Plaintiffs have also shown that disclosure of the entities and persons who compound, test, sell, or supply the lethal injection drugs will play a significant role in the functioning of the lethal injection process. In Exhibit 7 to the Amended Complaint, Larry D. Sasich, PharmD, MPH, FASHP, opines that the oversight of compounding pharmacies in the United States is "at best haphazard." Dr. Sasich further states that the use of contaminated Pentobarbital in prior executions illustrates the high risk of needless suffering posed by the use of compounded drugs in lethal injections, and that the lethal injection procedure may be painful and give rise to serious complications if, or when, the drugs are obtained from disreputable sources. The more damning evidence that supports Plaintiff's arguments on this issue is the ADC's history of obtaining lethal injection drugs from a disreputable source, a wholesaler operating illegally from the back of a driving school.

Defendants worked to conceal information about the sources for lethal injection drugs to be used in carrying out capital punishment under Act 1096 even before executions using lethal injection drugs were suspended in Oklahoma. The Oklahoma Department of Correction used a wrong drug as part of its injection protocol to execute Clayton Lockett and misstated the drug that was used. In Arizona, Missouri, and Ohio, executions have been marked by reports that condemned inmates experienced and gave symptoms of being in pain, writhed, and otherwise appeared to suffer pain without relief over a prolonged period before dying. Given this history and growing sense of national concern, Defendants' argument that the condemned death row inmates, in this

case, have no constitutional right to know who supplies the drugs that will cause their deaths is unpersuasive.

The issue is whether Defendants are entitled to judgment as a matter of law. The Court holds that they are not. Plaintiffs have met both prongs established in the *Press-Enterprise* case, that is, the information sought has "historically been open to the press and general public," and access to that information would play "a significant positive role in the functioning of the particular process in question." *Press-Enterprise Co. v. Superior Court,* 478, U.S. 1 (1986).

Plaintiffs' Article II, § 9 Claim

Defendants' summary judgment motion concerning Plaintiffs' claim that Act 1096 and the lethal-injection protocol it authorizes violate the ban on cruel or unusual punishment stated at Article II, § 9 of the Arkansas Constitution is denied. The Court finds that there are disputed facts concerning whether the lethal-injection protocol using midazolam will subject Plaintiffs to a substantial risk of conscious and prolonged pain.

In Exhibit 5 to the Amended Complaint, Craig W. Stevens, P.H.D., opines that midazolam cannot induce general anesthesia, and a prisoner sedated only with midazolam would experience intense pain and suffering from the administration of vecuronium bromide and potassium chloride, but be unable to communicate his distress. Defendants, in contrast, rely on the fact that midazolam protocols have been upheld by numerous courts, namely Oklahoma. Given that factual dispute, summary judgment is not appropriate.

Arkansas has the authority to execute Plaintiffs' death sentences. That authority does not render Plaintiffs helpless to protect themselves from being put to death with

lethal injection drugs and using a protocol that will subject them to a substantial risk of pain.

Under Arkansas law governing euthanization of animals, "humanely killing" is defined as "causing the death of an animal in a manner intended to limit the pain or suffering of the animal as much as reasonably possible under the circumstances." Ark. Code Ann. § 5-62-102 (12). Subsection 8 of that statute defines "cruel mistreatment" as "any act that causes or permits the continuation of unjustifiable pain or suffering." Subsection 11 of that statute defines "euthanizing" as "humanely killing an animal accomplished by a method that utilizes anesthesia produced by an agent that causes painless loss of consciousness and subsequent death,... ." And Subsection 21 of A.C.A. 5-62-102 defines "torture" as "[t]he knowing commission of physical injury to a dog, cat, or horse by the infliction of inhumane treatment ... causing the dog, cat, or horse intensive or prolonged pain ... ."

Judging from Defendants' argument, people condemned to death for committing murder have "no constitutional right to information or documents that may identify entities and persons who compound, test, sell, or supply drugs for the execution process," even when executions using lethal injections have been marked by pain that would fit the definition of "cruel mistreatment" if suffered by domestic pets and livestock in Arkansas. The Court rejects the notion that domestic pets and livestock in Arkansas have the right to die free of unjustifiable and prolonged pain, but that the constitutional guarantee against "cruel or unusual punishment" found in the Arkansas Constitution allows people who commit murders to be put to death as if they have no entitlement to such right.

Plaintiffs' Procedural Due Process Claim

Plaintiffs argue that the non-disclosure mandate of Act 1096 violates procedural due process by denying them access to all evidence about the sourcing of the drugs that will be used for their executions. Plaintiffs further argue that this information is crucial to ensuring that their executions comply with the ban on cruel or unusual punishment. Defendants, on the other hand, argue that Plaintiffs do not have a due process right to discover the information sought, or to enable them to discover grievances and to litigate effectively once in court.

Both parties have moved for summary judgment on this claim. However, "the fact that both parties have moved for summary judgment does not establish that there is no issue of fact. A party may concede that there is no issue if his legal theory is accepted and yet maintain that there is a genuine dispute as to material facts if his opponent's theory is adopted." *Wood v. Lanthrop,* 249 Ark. 376 (1970).

The facts are undisputed that Act 1096, as applied to these Plaintiffs, has been interpreted by Defendants as justifying concealing information about the source of lethal injection drugs from the Plaintiffs, the condemned people who will be the object of those drugs. Due process requires that persons threatened with deprivation of constitutional rights (in this instance Plaintiffs allege that they are at substantial risk of suffering cruel or unusual punishment) are entitled to a meaningful opportunity to challenge the governmental action that threatens them. The notion that Plaintiffs can meaningfully assert their "cruel and unusual punishment" claim without access to information about the source of the agents they allege will render their deaths "cruel and unusual punishment" is absurd on its face. Defendants' motion for summary judgment concerning Plaintiffs' procedural due process claim is denied.

Plaintiffs' Substantive Due Process Claim

Defendants' motion for summary judgment concerning Plaintiffs' substantive due process claim must be denied because the facts are disputed concerning whether the sedative (midazolam), mandated for administration by Act 1096, is effective to render a person unconscious and insensitive to pain. The parties submitted affidavits from scientists that are in direct conflict. Defendants' motion for summary judgment concerning Plaintiffs' substantive due process claim is denied.

Plaintiffs' Separation of Powers Claim

Defendants' summary judgment motion concerning Plaintiffs' allegation that Act 1096 impairs the judicial function is granted. Plaintiffs allege that Act 1096, on its face, is an unlawful legislative encroachment into the judicial power. Act 1096 requires the ADC to seek a protective order before disclosing information that identifies the manufacturers, suppliers, testing laboratories, and test results related to drugs used during lethal injections. That requirement is a directive to the executive branch that does not encroach on the judicial function of deciding whether information shielded from disclosure by Act 1096 is relevant for purposes of discovery. Nor does the non-disclosure requirement prevent trial courts from deciding whether to grant a motion for protective order.

Plaintiffs argue, and the undisputed facts show, that Defendants have sought the protective order as part of a wholesale effort to thwart disclosure about the sources of lethal-injection drugs. That effort included lobbying for enactment of Act 1096 and its non-disclosure provisions, and now asserting the non-disclosure provisions as a constitutional basis for denying Plaintiffs information about the sources of lethal injection

drugs. However, as the subsequent discussion concerning Defendants' Motion for protective order will show, the Court finds no basis for issuing a protective order. Defendants' motion for summary judgment on this point is granted. Plaintiffs' motion for partial summary judgment on this point is denied.

Plaintiffs' Substantive Cruel or Unusual Punishment Claim

Defendants' motion for summary judgment concerning Plaintiffs' substantive cruel or unusual punishment claim is denied for the same reasons that Defendants' summary judgment motion concerning Plaintiffs' substantive due process claim is denied. Both sides have submitted conflicting affidavits concerning the efficacy of midazolam and whether the three-drug protocol prescribed by Act 1096 poses a substantial risk that Plaintiffs will experience cruel or unusual punishment. Because there are disputed issues of fact concerning Plaintiffs' substantive cruel or unusual punishment claim, summary judgment is inappropriate for any party.

Plaintiffs' Public Expenditures Clause Claim

Finally, Defendants' summary judgment motion concerning Plaintiffs' claim that Act 1096 violates the requirement that the State publicly make available "[a]n accurate and detailed statement of the receipts and expenditures of public money, the several amounts paid, [and] to whom and on what account" is denied, and Plaintiffs motion for partial summary judgment on that ground is granted. There are no disputed facts surrounding this issue.

Defendants are mistaken in their argument that the constitutional requirement found at Article 19, Section 12 of the Arkansas Constitution somehow authorizes the legislature to decide to conceal when public money is spent, to whom it is paid, and the

purposes for those expenditures. Article 19, Section 12 is a constitutional mandate for disclosure, not a suggestion that the General Assembly may disclose this information or not do so as it desires.

Defendants' Motion for Protective Order

Defendants have moved for a protective order "to shield them from making the disclosures contemplated by the Court's October 12, 2015, Scheduling Order pursuant to Rule 26(c) of the Arkansas Rules of Civil Procedure." That Order states, in pertinent part, as follows:

> Defendants are hereby ordered to identify or otherwise object to disclosure of the identity of the manufacturer, seller, distributor, and supplier of any lethal injection drugs to be used in the execution of any of the plaintiffs not later than October 21, 2015. If Defendants move for a protective order as to disclosure of this information, pursuant to Rule 26(c) of the Arkansas Rules of Civil Procedure, Defendants shall, with the motion, set forth with particularity and provide any supplemental information Defendants desire the Court to consider regarding any facts or circumstances bearing on the motion for protective order.
>
> Defendants are hereby ordered to produce, not later than October 21, 2015, to counsel for Plaintiffs and the Court, un-redacted package inserts, shipping labels, laboratory test results, and product warning labels pertaining to any drugs Defendants will administer during the method of execution (MOE) protocol for each Plaintiff.

Defendants base their motion for protective order on four arguments. First, Defendants contend that Plaintiffs waived their right to conduct discovery "on the provenance of the ADC's FDA-approved drugs" by filing a motion for partial summary judgment on their cruel or unusual punishment and other disclosure-related claims. Defendants also argue that an order compelling disclosure of the information mentioned in the Scheduling Order would have the practical effect of deciding the merits of this litigation before the Court renders a final ruling. Defendants also contend that the identities of the manufacturers and suppliers of lethal-injection drugs to be used in

Plaintiffs' executions are not relevant to any claim pending in this litigation. Finally, Defendants contend that because § 2(i) of Act 1096 of 2015 requires the ADC to preserve the confidentiality of all information that may identify or lead to the identification of "entities and persons who compound, test, sell, or supply" lethal injection drugs, the Court should "defer to the legislature's policy choices and follow the confidentiality provision absent a compelling reason not to, which is absent in this case."

Plaintiffs contend that the merits of their "disclosure claims" should be adjudicated before the Court orders disclosure. Plaintiffs ask the Court to first determine whether summary judgment is appropriate on Claim 2 (Freedom of Speech and Press), and Claim 8 (Public Expenditures Clause), then, if the Court finds the secrecy provision of Act 1096 unconstitutional, Plaintiffs assert that there is no need for a protective order as there is no basis for Defendants to keep the requested information secret from the public at large. In the alternative, if Claims 2 and 8 fail on the merits, the "prudent course" is for the Court to address the remaining "disclosure claims," Claim 1 (Contract Clause), Claim 3 (Cruel or Unusual Punishment (Procedural)), Claim 4(a) (Due Process (Procedural)), and 5(b) (Separation of Powers), on the merits, before issuing a protective order. If Plaintiffs are successful on the remaining "disclosure claims," they argue that a protective order should allow the "Prisoners, their experts, and their attorney to learn the identities of the manufacturers and suppliers of the drugs Defendants intend to use in executions."

Because the Court has addressed the summary judgment motions filed by both parties, a decision concerning Defendants' motion for protective order will not have the effect of prematurely deciding the merits of the competing arguments about Plaintiffs'

claims that Act 1096 violates Article II, § 17 (the impairment of contracts clause), Article II, § 6 (the public right to access documents clause), and Article II, § 12 (the public expenditures clause) in the Arkansas Constitution. Therefore, the Court finds that Defendants' motion for protective order is ripe for decision.

Defendants' motion for protective order is governed by Rule 26 of the Arkansas Rules of Civil Procedure, which states, in pertinent part, as follows:

> (b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:
>
> (1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the issues in the pending actions, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition, identity and location of any books, documents, or other tangible things and the identity and location of persons who have knowledge of any discoverable matter or who will or may be called as a witness at the trial of any cause. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.
>
> ...
>
> (c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, stating that the movant has in good faith conferred or attempted to confer with other affected parties in an effort to resolve the dispute without court action, and for good cause shown, the court in which the action is pending may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed be opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file

specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

The Arkansas Rules of Civil Procedure clearly adopt a liberal position on discovery in civil litigation. Except for privileged matters, a party may obtain discovery of any information that is relevant to "the issues" in pending litigation, including information that, while not admissible as evidence in its own right, is reasonably calculated to lead to the discovery of admissible evidence (Rule 26(b)1). Thus, the Court's analysis of Defendants' motion for protective order is governed by the following factors:

- Is the information sought (identity of lethal injection drug supplier and manufacturers, etc.) relevant to issues in the case? Why not?
- If the information is discoverable, is it privileged?
- If the information is (a) discoverable and (b) not privileged, is it otherwise sensitive?
    - Is it proprietary?
    - Is it classified?
    - Is it typically shielded from disclosure?
    - Will disclosure subject defendants or non-parties to undue harm (due to embarrassment, injury, etc.)?

The Court finds that none of these factors justify non-disclosure.

The Relevancy Test

The Court holds that the information Defendants seek to withhold from disclosure is relevant to issues Plaintiffs have raised in their various claims. Plaintiffs have alleged from the outset of this litigation that Defendants "promised to reveal to [Plaintiffs] any future source of execution drugs in exchange for [Plaintiffs] dropping their challenges to the ADC's then-existing execution procedure." (Complaint filed June 29, 2015,

Paragraph 10(a), page 4). Defendants, while challenging Plaintiffs' claim that Act 1096 of 2015 worked to impair or abrogate the agreement Plaintiffs have alleged, acknowledge that the information they are ordered to disclose by the Scheduling Order is related to Plaintiffs' abrogation of contracts claim (Claim 1) in this litigation.

The Ordered Information is Not Privileged

Rule 501 of the Arkansas Rules of Evidence states:

> Except as otherwise provided by constitution or statute or by these or other rules promulgated by the Supreme Court of this State, no person has a privilege to:
> (1) refuse to be a witness;
> (2) refuse to disclose any matter;
> (3) refuse to produce any object or writing; or
> (4) prevent another from being a witness or disclosing any matter or producing any object or writing.

Defendants acknowledge that Act 1096 of 2015 does not create a privilege. Defendants have not asserted any privilege from disclosure recognized by the Arkansas Rules of Evidence.

Rule 508 of the Arkansas Rules of Evidence recognizes governmental privileges. Rule 508 states:

> (a) If the law of the United States creates a governmental privilege that the courts of this State must recognize under the Constitution of the United States, the privilege may be claimed as provided by the law of the United States.
> (b) *No other governmental privilege is recognized except as created by the Constitution or statutes of this State.*
> (c) Effect of sustaining claim. If a claim of governmental privilege is sustained and it appears that a party is thereby deprived of material evidence, the court shall make any further orders the interests of justice require, including striking the testimony of a witness, declaring a mistrial, finding upon an issue as to which the evidence is relevant, or dismissing the action. (Emphasis added).

The Court holds that the information covered by the Scheduling Order is not privileged.

Whether contested information is relevant for purposes of discovery has long been recognized to be a matter for the sound discretion of the trial court. Although

Defendants rely heavily on decisions from other jurisdictions that ruled disclosure of the type of information sought by Plaintiffs in this litigation not relevant, those rulings are not controlling on this Court. At most, they show how other courts have addressed the relevancy question. Rulings from other courts are suggestions, not mandates, regarding the relevancy issue.

Defendants' Reliance on *In re: Ohio Execution Protocol Litigation*

Defendants insist that the recent decision by the United States District Court for the Southern District of Ohio in *In re: Ohio Execution Protocol Litigation,* No. 2:11-cv-1016, 2015 WL 6446093 (S.D. Ohio Oct. 26, 2015) is pertinent to, and instructive about the disclosure issue in this case. In *Ohio Execution Protocol Litigation*, a federal trial judge granted a motion by defendants for a protective order shielding the identities of persons and entities needed to acquire execution drugs and related materials. In that case, as in this case, the defendants argued that without disclosure they "will not be able to obtain the drugs, materials, and testing necessary to carry out a lawful execution... because, according to Defendants, persons and entities who do not have anonymity would be subjecting themselves to risk of harassment, harm, or similar undesirable consequences that would chill, if not preclude, their willingness to supply the drugs or related assistance." (*Supra*, p. 1).

Ohio Execution Protocol Litigation is distinguishable from this case in several glaring respects. First, the Ohio legislature enacted a nondisclosure statute in November 2014 which (a) amended the definition of "public record" to exclude "information and records that are made confidential, privileged, and not subject to disclosure" under Ohio law; (b) included information identifying persons who

manufacture, compound, prescribe, import, transport, distribute, supply, administer, use, or tests execution drugs within the nondisclosure provision; (c) made information concerning such persons "privileged under law" and; (d) established a cause of action in favor of any "person, employee, former employee, or individual" whose identity and participation in providing execution drugs and materials is revealed, with relief that includes actual damages, punitive damages, attorney's fees, and court costs. The court relied on that statute in concluding that there was good cause for a requested protective order, but expressed concern "about issuing a blanket protective order that enables Defendants to exceed the scope of Ohio's execution protocol and secrecy statute." (*Supra*, p. 7).

Furthermore, the court in *Ohio Execution Protocol Litigation*, with commendable candor, acknowledged that "some of Defendants' assertions of burdens or prejudice connected to disclosure are largely speculative or conclusory, if not outright hyperbolic." Supra, p. 2). Yet, while acknowledging that "all the witnesses who were asked agree that there has not been a single known threat against a compounding pharmacy that might supply drugs to Ohio," and that "mere possibility of a fringe group of extremists does not invariably translate into a burden or prejudice sufficient to warrant issuance of a protective order," the court in *Ohio Execution Protocol Litigation* considered the Defendants' "speculative," "conclusory," "if not outright hyperbolic" assertions probative that disclosure of the identity of the suppliers of execution drugs would pose a tangible and prejudicial burden on their ability to obtain execution drugs, supplies, and materials.

Despite what the court in *Ohio Execution Protocol Litigation* concluded, conjecture, speculation, and surmise that suppliers of execution drugs might face

adverse publicity, unpopularity, and non-specific threats (including un-proven threatened sanctions from manufacturers with whom they have agreed they will not provide the drugs for executions), does not prove disclosure will unduly burden the Defendants in this case. Defendants already possess execution drugs. They do not need a protective order to protect them from the risk of not being able to procure what they already have.

Moreover, few things are as untrustworthy as unsubstantiated conjecture. As Sir Arthur Conan Doyle's most famous character remarked, "It is a capital mistake to theorize before one has data. Insensibly one begins to twist facts to suit theories, instead of theories to suit facts."[1] The court in *Ohio Execution Protocol Litigation* appears to have succumbed to the "capital mistake" of twisting what it acknowledged as no proof of "a single known threat" into a finding that disclosing the identities of the persons, entities, or other suppliers of execution drugs, materials, and supplies would not only burden the defendants in that case, but that it would pose "an undue burden," as that is the evidentiary prerequisite for issuing a protective order.

As the Arkansas Supreme Court has forcefully declared, "substantial evidence is evidence that a reasonable mind would accept as sufficient to support a conclusion and force the mind beyond speculation and conjecture." *Ozark Gas Pipeline Corp. v. Ark. Psc*, 342 Ark. 591 (2000) Citing *Bohannon v. Arkansas State Bd. of Nursing*, 320 Ark. 169 (1995). It is "defined as 'evidence of sufficient force and character to compel a conclusion one way or the other with reasonable certainty; it must force the mind to

[1] Sir Arthur Conan Doyle, A SCANDAL IN BOHEMIA, from THE ADVENTURES OF SHERLOCK HOLMES.

pass beyond suspicion or conjecture.'" *Id.* Citing *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232 (1998).

This Court declines Defendants' encouragement to flatter the court in *Ohio Execution Protocol Litigation* by imitating its "capital mistake." A protective order must be based on something far more substantial than "speculative' "conclusory," or "outright hyperbolic" assertions. And even if it is true that the Defendants obtained lethal injection drugs from a supplier who fears economic sanctions for violating agreements not to provide drugs for lethal injections, Defendants have no standing to assert that third-party fear as a basis for obtaining a protective order in this litigation. A drug supplier that provides drugs for use in capital punishment contrary to an agreement or policy with a drug manufacturer is not entitled to be held harmless by the State for breaking a contract, let alone, be provided a governmental shield from public disclosure for having done so.

Defendants argue that disclosure will subject suppliers of lethal injection drugs to criticism or negative publicity. Defendants have cited no provision in the Constitution of Arkansas which vests any governmental vendor, including suppliers of lethal injection drugs, with the right to anonymity. There is no constitutional right for a governmental vendor, including a vendor who supplies lethal injection drugs used for capital punishment, to enjoy governmental protection from criticism. Defendants' concern that suppliers of lethal injection drugs will be criticized for doing so does not constitute an undue burden that justifies imposition of a protective order.

Act 1096 of 2015 does not Bar Disclosure

Defendants also rely on a provision of Act 1096 of 2015 as justification for their motion for protective order and contend that disclosure of the information prescribed by the Court's Scheduling Order is tantamount to a ruling on the merits of this litigation. Neither contention bears up under careful scrutiny.

It is true that Act 1096 of 2015 contemplates that the information sought by Plaintiffs and ordered disclosed by the Court's Scheduling Order will be treated as confidential. Section 2 (i) and (j) of Act 1096 read as follows:

> (i)(1) The ... identities of the entities and persons who participate in the execution process or administer the lethal injection are not subject to disclosure under the Freedom of Information Act of 1967, § 25-19-101 et seq.
> (2) The department shall keep confidential all information that may identify or lead to the identification of: (A) the entities and persons who participate in the execution process or administer the lethal injection; and (B) the entities and persons who compound, test, sell, or supply the drug or drugs described in subsection (c) of this section, medical supplies, or medical equipment for the execution process.
> (3) *The department shall not disclose the information covered under this subsection in litigation without first applying to the court for a protective order regarding the information under this subsection.*
> (j) The department shall make available to the public any of the following information upon request, so long as the information that may be used to identify the compounding pharmacy, testing laboratory, seller, or supplier is redacted and maintained as confidential: (1) package inserts and labels, if the drug or drugs described in subsection (c) of this section have been made by a manufacturer approved by the United States Food and Drug Administration; (2) reports obtained from an independent testing laboratory; and (3) the department's procedure for administering the drug or drugs described in subsection (c) of this section, including the contents of the lethal-injection box. (Emphasis added).

Act 1096 makes the information that the Scheduling Order describes confidential, not privileged. There is no governmental privilege to withhold information about the identities of persons or entities who sell, distribute, manufacture, or supply lethal

injection drugs to the State of Arkansas, whether in the Arkansas Rules of Evidence or any Arkansas legislation, as was stated above.

Act 1096 explicitly, and correctly, contemplates that litigation concerning discoverability about the identities of sellers, manufacturers, suppliers, and distributors of lethal injection drugs will be resolved by courts and judges on a case-by-case basis. The General Assembly of Arkansas has, to be sure, directed that a motion for protective order will be asserted to prevent voluntary disclosure of this information. The General Assembly, however, did not ban disclosure.

Defendants are mistaken by their contention that disclosure amounts to a decision on the merits of Plaintiffs' claims. That contention is contradicted by Defendants' argument that "production of information regarding manufacturers and suppliers *now* would do nothing to prove the merits of whether [Plaintiffs] are contractually entitled to such disclosures." (Defendants' brief in support of motion for protective order, page 10).

Furthermore, there are no valid reasons to limit disclosure to Plaintiffs' counsel as Defendants urge the Court to do by way of a protective order. The information covered by the Scheduling Order is not ordinarily or customarily secret by any means. As previously mentioned, this information was available to any member of the public via a Freedom of Information Act request until Act 1096 was enacted. Entities that manufacture, distribute, supply, and market lethal injection drugs are obliged to disclose what they are making, distributing, supplying, and selling.

It is common knowledge that capital punishment is not universally popular. That reality is not a legitimate reason to shield the entities that manufacture, supply, distribute, and sell lethal injection drugs from public knowledge.

Plaintiffs did not Waive their Discovery Rights

From the outset of this litigation, Plaintiffs have continuously demanded the information covered by the Scheduling Order. Actually, Plaintiffs allege they sought this information in previous litigation between the parties, and that Defendants agreed to disclose it, voluntarily, before Act 1096 was enacted—at the behest of Defendants—to make the information confidential after Defendants agreed to disclose it.

Plaintiffs have suggested that Defendants may be obtaining lethal injection drugs from unreliable sources, that if compounded drugs are used they may be ineffective or may be produced by unreliable vendors, and that midazolam (the first drug to be used in the three-drug lethal injection protocol prescribed by Act 1096) is, itself, ineffective to render someone unconscious and insensitive to pain. Defendants have strenuously disputed those contentions. Both sides filed motions for summary judgment, supported by conflicting affidavits and other materials, as the parties struggled to present their competing positions to the Court ahead of the scheduled executions of two Plaintiffs on October 21. Defendants filed their motion for summary judgment before filing an answer to the amended complaint. The Court has now addressed the summary judgment motions.

The Arkansas Supreme Court issued a stay of executions to allow for a proper and full resolution of this case, including discovery and trial. The discovery

contemplated by the Scheduling Order is consistent with that objective, the Supreme Court's stay, and the reasons that underlie it.

Defendants' argument that Plaintiffs waived discovery by filing their summary judgment motion is erroneous. A party who files a motion for summary judgment does not concede that no material issue of fact exists in the case. *Chick-a-Dilly Properties, Inc. v. Hilyard,* 42 Ark. App. 120 (1993) Citing *Wood v. Lathrop,* 249 Ark. 376 (1970). "That argument is opposed to both reason and to authority." *Id.* "The mere fact that both parties seek summary judgment does not constitute a waiver of a full trial or the right to have the case presented to a jury." *Wood v. Lathrop,* 249 Ark. 376 (1970). Neither party has waived the right to a full trial, which includes the right to conduct discovery.

Defendants' "Attorneys' Eyes Only" Contention

Defendants argue that Plaintiffs "have no legitimate need to know the identity of proximate supplier(s) or middlemen," and that "disclosure of that information would serve to destruct [sic] the constitutionally-protected business interest of nonparty(ies) to this litigation, who provided the drugs to the ADC in reliance on the confidentiality afforded by Act 1096."

As stated above, Defendants do not cite any legal authority that business vendors with the Arkansas Department of Correction have a constitutional right to anonymity. If there is, in fact, some "constitutionally-protected business interest of nonparty(ies) to this litigation," as Defendants contend, Defendants have failed to explain where that right is expressed in the Constitution of Arkansas or the Constitution

of the United States, and/or how that right has been recognized by the Arkansas Supreme Court.

Moreover, Defendants cite no legal authority—whether in Arkansas or elsewhere—for the manifestly untenable proposition that attorneys are entitled to withhold information about discovery from their clients, let alone, that courts are authorized to condone such secrecy.

To the contrary, Defendants' position flies in the face of the ethical responsibility every lawyer owes any client. Rule 1.4 of the Arkansas Rules of Professional Conduct states, in pertinent part, as follows:

> **Rule 1.4. Communication.**
>
> (a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in Rule 1.0(e), is required by these Rules. (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; (3) keep the client reasonably informed about the status of the matter; (4) promptly comply with reasonable requests for information; and (5) consult when the lawyer knows that the client expects assistance not permitted by the Rules of Professional Conduct or other law. (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

Defendants do not suggest how, or why, Rule 1.4 is inapplicable to counsel for the Plaintiffs in this litigation. Defendants do not suggest how, or why, Plaintiffs are not entitled to the level of ethical conduct from their attorneys contemplated by Rule 1.4. Defendants do not suggest how, or why, this Court should behave as if Rule 1.4 does not exist. Beyond that, Defendants do not suggest how, or why, this Court is somehow authorized to issue a protective order that would, in effect, subject counsel for Plaintiffs to discovery sanctions for engaging in conduct every Arkansas lawyer is ethically obligated to provide any client.

Attorneys have a fiduciary duty to communicate with their clients. That duty is not client-specific. It applies to attorneys who represent death row inmates convicted of committing murders as well as attorneys who represent other parties. The contention that this or any other Court should treat the attorney-client relationships of the attorneys and Plaintiffs in this litigation in a different manner from the way the law respects the ethical obligation of attorneys to clients in other litigation is not only unfair – It is unethical.

Conclusion

For the foregoing reasons, Plaintiffs' Motion for Partial Summary Judgment is hereby GRANTED as to Claim 1 (impairment of contracts). Defendants' Motion for Summary Judgment as to Claim 1 is DENIED. The Court holds that the non-disclosure provision within Act 1096 of 2015, § 2(i)2, violates Article II, § 17 of the Arkansas Constitution, and hereby declares § 2(i)2 of Act 1096 of 2015 null and void, effective immediately.

Plaintiffs' Motion for Partial Summary Judgment as to Claim 2 (right to access governmental information) is hereby GRANTED. The Court holds that the non-disclosure provision in Act 1096 of 2015 violates Article II, § 6 of the Arkansas Constitution. Defendants' Motion for Summary Judgment as to Claim 2 is DENIED.

Plaintiffs' Motion for Partial Summary Judgment as to Claims 3 (Cruel or Unusual Punishment – Procedural), 4(a) (Procedural Due Process), and 8 (Public Expenditures Clause), is hereby GRANTED. Defendants' Motion for Summary Judgment concerning those Claims is DENIED.

Defendants' Motion for Summary Judgment as to Claim 5(b) (Separation of Powers – Judicial Encroachment), is hereby GRANTED. Plaintiffs' Motion for Summary Judgment as to Claim 5 is DENIED. Defendants' Motion for Summary Judgment as to all other claims asserted by Plaintiffs is DENIED.

Defendants' Motion for a Protective Order is hereby, and in all respects, DENIED.

Defendants are ordered to produce the information prescribed by the Court's Scheduling Order, as set forth therein and at page 1 herein, not later than Noon on December 4, 2015.

ORDERED this 3rd day of December, 2015.

CIRCUIT JUDGE

THIS IS A CAPITAL CASE

No. _____

In the Supreme Court of the United States

STACEY JOHNSON, JASON McGEHEE, BRUCE WARD, TERRICK NOONER, JACK JONES, MARCEL WILLIAMS, KENNETH WILLIAMS, DON DAVIS, and LEDELL LEE

Petitioners

v.

WENDY KELLEY, in her official capacity as Director, Arkansas Department of Correction, and ARKANSAS DEPARTMENT OF CORRECTION

Respondents

CERTIFICATE OF SERVICE

I hereby certify that I have served all parties required to be served with the Petition for a Writ of Certiorari and Petitioners' Motion to Proceed In Forma Pauperis. Specifically, in compliance with S. Ct. R. 29.3, I emailed and hand-delivered a copy of these documents to below-listed counsel on October 19, 2016:

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